

Title: School District of the City of Grand Rapids, et al.,  
Petitioners  
v.  
Phyllis Ball, et al.

Court: United States Court of Appeals  
for the Sixth Circuit

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Costema, John R.

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Entry	Date	Note	Proceedings and Orders
1	Dec 15 1983	G	Petition for writ of certiorari filed.
2	Jan 11 1984		Lodging received.
3	Jan 12 1984		Brief of respondents Phyllis Ball, et al. in opposition filed.
4	Jan 13 1984		DISTRIBUTED. February 17, 1984
5	Feb 22 1984		DISTRIBUTED. February 24, 1984.
7	Feb 27 1984		Petition GRANTED.
9	Mar 22 1984		***** Order extending time to file brief of petitioner on the merits until April 25, 1984.
10	Apr 10 1984		Order further extending time to file brief of petitioner on the merits until May 12, 1984.
11	May 11 1984		Brief of petitioners Phillip Runkel, et al. filed.
12	May 11 1984		Joint appendix filed.
13	May 11 1984		Brief amicus curiae of Natl. Jewish Comm. on Law (COLPA) filed.
14	May 11 1984		Brief amicus curiae of U.S. Catholic Conference filed.
15	May 17 1984		Brief amicus curiae of United States filed.
16	May 29 1984	G	Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Jun 11 1984		Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
18	Jun 8 1984		Brief amicus curiae of Baptist Jt. Comm. on Public Affairs filed.
19	Jun 11 1984		Brief of respondents Phyllis Ball, et al. filed.
20	Jun 11 1984		Brief amicus curiae of Americans United for Separation of Church & State filed.
21	Jun 18 1984		Brief amicus curiae of American Jewish Congress, et al. filed.
22	Jun 23 1984		Record filed.
23	Jun 23 1984		Certified copy of joint appendix & C.A. proceedings received.
24	Jul 20 1984	D	Motion of respondents to permit Nancy L. Dilley, Esq., to present oral argument pro hac vice filed.
25	Aug 23 1984		Motion of respondents to permit Nancy L. Dilley, Esq., to present oral argument pro hac vice DENIED.
26	Sep 20 1984		Reply brief of petitioners Sch. Dist. of Grand Rapids, et al. filed.



No. 93-990-CFX

Entry	Date	Note	Proceedings and Orders
27	Oct 22 1984		SET FOR ARGUMENT. Wednesday, December 5, 1984. (1st case).
28	Nov 1 1984	3	Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument pro hac vice filed.
29	Nov 1 1984		CIRCULATED.
30	Nov 13 1984		Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument pro hac vice GRANTED.
31	Dec 5 1984		ARGUED.

No. ....

**DEC 15 1983****IN THE SUPREME COURT OF THE UNITED STATES****October Term, 1983**

ALEXANDER L. STEVENS

CLERK

**THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS;**  
**PHILLIP RUNKEL**, Superintendent of Public Instruction of the  
 State of Michigan; **STATE BOARD OF EDUCATION OF THE**  
**STATE OF MICHIGAN;** **LOREN E. MONROE**, State Treasurer  
 of the State of Michigan; **IRMA GARCIA-AGUILAR** and **SIMON**  
**AGUILAR, BRUCE** and **LINDA BYLSMA, ROBERT** and **PENE-**  
**LOPE COMER, CLARENCE** and **ROSALEE COVERT, SCIPUO**  
 and **JANICE FLOWERS, JOHN** and **SHIRLEY LEETSMA,**  
 Petitioners,

-vs-

**PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS;**  
**PATRICIA DAVIS; FREDERICK L. SCHWASS** and **WALTER**  
**BERGMAN,**

Respondents.

**JOINT PETITION FOR A WRIT OF CERTIORARI**  
**TO THE UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

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**QUESTIONS PRESENTED****I.**

Whether it constitutes a *per se* violation of the establishment clause to provide secular, supplementary, nonsubstitutionary instructional services to part-time public school students on premises leased from religiously-oriented nonpublic schools under conditions of public school control.

**II.**

Whether the Court of Appeals' majority ruling upholding respondents' state taxpayer standing is inconsistent with this Court's decisions where, as here, respondents challenge the decisions of the executive branch of state government and of the school district, and do not challenge the constitutionality of a legislative appropriation.

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No. ....

**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 1983**

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**THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEETSMA,**

**Petitioners,**

**-vs-**

**PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,**

**Respondents.**

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**JOINT PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

Petitioners School District of the City of Grand Rapids; Phillip Runkel, Superintendent of Public Instruction of the State of Michigan; State Board of Education of the State of Michigan; Loren E. Monroe, State Treasurer of the State of Michigan; Irma Garcia-Aguilar and Simon Aguilar, Bruce and Linda Bylsma, Robert and Penelope Comer, Clarence and Rosalee Covert, Scipuo and Janice Flowers, and John and Shirley Leetsma, pray that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 23, 1983.

## OPINIONS AND ORDERS OF THE COURTS BELOW

The September 23, 1983, Opinion of the Court of Appeals and the Notice of Entry of Judgment, along with the August 16, 1982, Opinion and Judgment of the District Court, 546 F. Supp. 1071, are in the Appendix to this petition. Hereafter, references to the Appendix will be indicated by page numbers enclosed in parentheses.

## JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on September 23, 1983. This petition for a Writ of Certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1) (West 1966).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, amendment I—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, article III, section 2, clause 1—"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claim-

ing Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

## STATEMENT OF THE CASE

### I. The Grand Rapids Public Schools Educational Services

For over sixty years<sup>[1]</sup> the Michigan legislature has entrusted local public school districts with the discretionary authority to determine how they can and should best utilize their resources to meet the educational needs of all students in their communities, including both public and nonpublic school students. Before the implementation of the programming in question, the Michigan judiciary specifically analyzed and approved the provision of shared time instruction on leased premises under conditions of public school control. *Traverse City School District v. Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971); *Citizens to Advance Public Education v. Superintendent of Public Instruction*, 65 Mich. App. 168, 237 N.W.2d 232 (1975), *appeal denied*, 397 Mich. 854 (1976). Consistent with those precedents and its philosophy of education to provide educational opportunity to the total community, the Grand Rapids Public Schools (GRPS) have, since the mid-1970's, made available to its Grand Rapids constituency a variety of instructional offerings designed to meet many and varied educational needs. At issue in this case are those offerings which were made available to approximately 11,000 students on premises leased from 41 area nonpublic schools through the operation of the Shared Time and Community Education programs.

[1]

*Traverse City School District v. Attorney General*, 384 Mich. 390, 407 n.2, 185 N.W.2d 9, 15 n.2 (1971).



The term "Shared Time" refers to instructional offerings on leased premises during regular school hours. The term "Community Education," on the other hand, refers to voluntary, leisure-time instructional offerings on leased premises after regular school hours. Although the scope of the District Court action encompassed Shared Time and Community Education programming on the elementary *and* secondary levels, the scope of the appeal to the Court of Appeals, and the scope of the instant certiorari request, was and is limited to the following:

1. Shared Time instruction on the elementary level in remedial and enrichment math, remedial and enrichment reading, art, music and physical education.
2. Shared Time instruction on the secondary level in math topics, a remedial math course.
3. Community Education instruction on the elementary level in voluntary, leisure-time activities such as model building, rug hooking and arts and crafts.

The nonpublic schools with children participating in the programs in each instance previously provided and continued to provide the basic core curriculum required for graduation or progression from grade to grade in the respective nonpublic school systems. None of the course offerings at issue in this appeal served to supplant or replace educational programming otherwise provided by area nonpublic schools. In essence, the GRPS educational services were designed to meet the special needs of educationally needy and gifted children and to provide nonpublic school children with educational opportunities beyond the basic nonpublic school core curriculum.<sup>[2]</sup>

[2]

Hereafter, petitioners will use the terms "supplementary" and "non-substitutionary" to refer to these particular aspects of the Shared Time and Community Education programs.

Children who participated in the programs were under the exclusive jurisdiction and control of the public school authorities during the time they received Shared Time and Community Education services on leased premises. Thus, pursuant to the statute appropriating state funds to school districts and its implementing regulations, such students were "part-time public school students."<sup>[3]</sup> (72a-73a). The revenues received by the school district under the State Aid formula for such students exceeded the cost of the instructional services here at issue, thereby also increasing the revenues available for and enhancing the instructional opportunities provided to full-time public school students.

At trial, the GRPS placed in evidence a comprehensive feasibility study which demonstrated that the decision to lease was predicated not only upon the educational desirability of providing such services on leased premises, but also, the administrative impossibility of providing such services in area public school buildings. Each year, written leases were executed between the GRPS and area nonpublic schools for the use of classroom space rented on a per-class basis. While in use for public school programming, such classrooms were posted as public school property and were free of any religious symbolism. (5a).

From their inception to implementation, the programs at issue were exclusively controlled by the public school district. The GRPS not only decided what would be offered and where,

[3]

Shared Time and Community Education instruction was available to all eligible to attend a public school. However, full-time public school students did not participate in such instruction because identical programming was available to them as part of the more extensive GRPS curriculum provided at public school buildings. As demonstrated by the analysis in *Wolman v Walter*, 433 US 229 (1977), student body identity is not a constitutionally determinative factor.



but also, who would teach, when, what would be taught, what materials, supplies and equipment would be used, and how students would be selected, graded, and if necessary, disciplined. Shared Time and Community Education teachers were hired, assigned, paid, evaluated and supervised by public school supervisors. Nonpublic school administrators neither controlled who was assigned to teach nor did they control what was taught. Many of the Shared Time teachers, to the extent they taught courses that only met once or twice a week, received a number of school assignments, some in public school buildings and some on leased premises. The control of these programs by the public school district is unequivocally demonstrated by the exhaustive trial record.<sup>[4]</sup>

Contrary to the lower courts' insistence that "[a] significant portion of the Shared Time instructors previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed" (75a, 6a), John Young, the Shared Time Director, testified as follows:

Q. . . . [H]ow many of those [i.e., Shared Time instructors] previously were employed by one of the nonpublic schools that we have had discussion about in this case?

A. [Of] [t]he 131 contracted GRPS teachers currently teaching in the Shared Time daytime programming, 13 of those formerly were employed by the nonpublic schools prior to their becoming public school

[4]

The lower court record, consisting of approximately 1400 pages of transcript and numerous documentary exhibits, includes testimony from 49 witnesses—public school teachers and administrators, parents, board members and nonpublic school personnel.

teachers. Three of those people in checking their records are not employed by the GRPS teaching in the same area that they taught at.

(Transcript, Vol VIIIA, at 1339-1340.) Most importantly, in examining the instructional services provided by the GRPS teachers, the majority below concluded:

There is no proof that any teacher in either Shared Time or Community Development [sic] classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion.

(35a).

## II. The Procedural History

Based on the establishment clause, plaintiffs challenged the constitutionality of providing the instructional services in question on premises leased from and otherwise occupied by religiously-oriented nonpublic schools.<sup>[5]</sup> Plaintiffs' complaint did not challenge the provision of these instructional services in public schools. The dispute in this case concerns the geographic locations at which the GRPS elected to provide such educational services.

After the filing of the initial pleadings by the party plaintiffs and the original party defendants (the school district and the state defendants), the lower court permitted the intervention of parents with students receiving the challenged instructional services. Following the completion of discovery, an 8-day nonjury trial was conducted before Judge Gibson be-

[5]

Six state taxpayer plaintiffs and one institutional plaintiff, Americans United for Separation of Church and State, filed the instant litigation. For lack of standing, the District Court dismissed the institutional plaintiff after the trial on the merits.

tween May 10 and May 20 of 1982. After the close of proofs, but before a decision on the merits, Judge Gibson recused himself and the matter was reassigned to Judge Enslen who proceeded, with the consent of the parties, to decide the case on the basis of the transcript testimony and other documentary evidence which had been submitted to Judge Gibson.

Judge Enslen issued his Memorandum Opinion on August 16, 1982, concluding that the services at issue violated the establishment clause. Accordingly, the Court issued an injunctive order permanently enjoining the defendants "from continuing to operate and conduct the above described programs." (123a).

On August 19, 1982, the GRPS, state defendants and intervenors filed their respective Notices of Appeal with the United States Court of Appeals for the Sixth Circuit. Pending those appeals, petitioners attempted but were unable to obtain a stay of the trial court's Judgment from the District Court, the Sixth Circuit Court of Appeals or a Justice of this Court. On September 23, 1983, the Court below, in a 2 to 1 decision authored by Judge Edwards, upheld the determination that the GRPS Shared Time and Community Education programs violated the establishment clause.

### REASONS FOR GRANTING THE WRIT

This case presents an important issue left unresolved by this Court's earlier establishment clause decisions—the permissibility of providing instructional services to part-time public school students on premises leased from religiously-oriented non-public schools under conditions of public school control. It impacts directly on the ability of states and local school districts to meet creatively their educational obligations, particularly to those who have special needs, the educationally needy and the gifted. Because of the *per se*, geographic analysis

of the majority below, it also casts a shadow of unconstitutionality upon Title I of the Elementary and Secondary Education Act of 1965, now found at 20 U.S.C.A. §2701 (West Supp. 1983), *et seq.*, which has provided educational assistance for many years to both public and nonpublic school students without violating the establishment clause.<sup>[6]</sup> This Court's decision in this case would provide much needed guidance to the bench and bar regarding the necessity of evaluating the relationships between public and nonpublic school authorities on the basis of the trial record in the individual case rather than on the basis of mechanical, *per se* rules.

### I.

**AN IMPORTANT ISSUE UNRESOLVED BY THIS COURT'S EARLIER DECISIONS—THE VALIDITY OF PROVIDING INSTRUCTIONAL SERVICES ON LEASED PREMISES—SHOULD BE DECIDED, AS REQUIRED BY THIS COURT'S RECENT DECISIONS, ON THE BASIS OF THE SIX-YEAR OPERATIONAL HISTORY REFLECTED IN THIS TRIAL RECORD RATHER THAN ON THE BASIS OF THE PER SE ANALYSIS UTILIZED BY THE MAJORITY BELOW.**

#### A. Introduction

This Court's prior decisions, while providing a general analytical framework, do not resolve the important establishment clause issue raised by this case. The unique elements of this case include the following:

#### [6]

*See Felton v. Secretary, United States Department of Education*, No. 78 CV 1750 (ERN) (E.D.N.Y. Oct. 4, 1983); *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808, *rehearing denied*, 449 U.S. 1028 (1980).



1. The educational services were purely secular, supplementary and nonsubstitutionary.
2. The educational services were provided to part-time public school pupils.
3. They were provided within religiously-oriented non-public schools but on leased premises under conditions of public school control.
4. The six-year operational history fully documented in the extensive trial record negated any necessity for judicial conjecture as to the potential for violating the establishment clause.

Given these unique characteristics and the unique posture of the trial record, petitioners submit that this case presents this Court with the opportunity to resolve an important, unsettled, establishment clause issue which is ripe for determination.

Despite this Court's admonition that establishment clause cases must be decided on actual—not hypothetical—relationships between public and nonpublic school authorities, many lower courts in the federal and state systems have transformed this Court's analysis in earlier cases into immutable "givens". Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. Rev. 1195, 1223 n.183 (1980). The decision of the Court of Appeals in this case fits all too comfortably into this pattern. Relying upon, in the words of Judge Krupansky, "speculation, conjecture and fac-

tually disproved hypotheses" (45a), the Court ignored the "flawless" (46a) operational history of the programs.<sup>[7]</sup>

In delineating an analytical framework for the resolution of cases under the oft-cited "three-part" establishment clause test, this Court in its recent cases charted a course which avoids the use of "categorical imperatives" or "absolutist approaches at either end of the range of possible outcomes." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980). Recognizing that "Establishment Clause cases are not easy," and that they "stir deep feelings," 444 U.S. at 662, Justice White in analyzing the Court's historical approach to such cases, observed:

This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the states—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

444 U.S. at 662.

In that context, the "three-part" test, in principle, has not served as a means to set the "precise limits to the necessary constitutional inquiry," *Meek v. Pittenger*, 421 U.S. 349, 359

[7]

Had the Court of Appeals majority in this case followed the establishment clause analysis dictated by recent decisions of this Court, they would have concluded, using the words of Chief Justice Burger in his separate opinion filed in *Meek v. Pittenger*, 421 U.S. 349, 385 (1975) (Burger, J., concurring in part, dissenting in part):

There is absolutely no support in this record or, for that matter, in ordinary human experience for the concern some see with respect to the 'dangers' lurking in extending common, nonsectarian tools of the education process—especially remedial tools—to students in private schools.

(1975), but rather, as a guideline “with which to identify instances in which the objectives of the Establishment Clause have been impaired,” 421 U.S. at 359, namely, the “‘sponsorship, financial support, and active involvement of the sovereign in religious activity’,” *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973), the three primary evils against which the establishment clause is directed.

Although originally referred to metaphorically as a “wall” of separation between church and state, it has been repeatedly recognized that the establishment clause “line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier,” *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), whose application and ultimate result depend in large measure on the factual circumstances of each case. *Regan; Wolman v. Walter*, 433 U.S. 229 (1977); *Wheeler v. Barrera*, 417 U.S. 402 (1974). Importantly, in terms of the establishment clause analysis generally, and the issue raised by this appeal particularly, when given the opportunity to enunciate a *per se* rule on the constitutional permissibility of providing secular instructional services in nonpublic schools, this Court, in *Wheeler v. Barrera*, concluded:

The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. *Usually it requires a careful evaluation of the facts of the particular case. . . . It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us.* A federal court does not sit to render a decision on hypothetical facts, and the Court of Appeals was correct in so concluding.

417 U.S. at 426 (emphasis supplied). See also *Nebraska State Board of Education v. School District*, 409 U.S. 921, 924

(Brennan, J., concurring) (a case involving the provision of educational services on premises leased from a religiously-oriented nonpublic school), *denying cert to School District v. Nebraska State Board of Education*, 188 Neb. 1, 195 N.W.2d 161 (1972); *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980).

Yet, in contradistinction from the above-noted principle and approach, the majority below instead premised its establishment clause result on a *per se*, geographic ruling that public school instruction at religiously-oriented, nonpublic schools is inherently unconstitutional. Given the detailed factual record and “flawless” operational history (46a), this case provides a unique vehicle for addressing and resolving the unanswered issue concerning the constitutionality of providing secular, supplementary instructional services on premises leased from nonpublic schools under conditions of public school control.

## B. The Primary Effect Component of the Test

Under the primary effect inquiry, the majority based its ultimate conclusion on three primary concerns: (1) its belief that the challenged programs benefitted a narrow class of beneficiaries; (2) its belief that the challenged programs served to financially benefit nonpublic institutions; and (3) its concern respecting the risk that religious doctrines would be advanced by instructors involved in the challenged programs. (48a-49a). These concerns are equally applicable to the remedial classes upheld in *Wolman*. Moreover, as observed by Judge Krupansky, “[t]his record demonstrates unequivocally . . . that the Shared Time and Community Education programs have remained in practice constitutionally neutral.” (45a-46a).

Although the majority concluded that the “challenged programs impact upon a very narrow religious class of benefi-



ciaries" (23a), it also conceded that Shared Time and Community Education programming was otherwise available to *all* full-time public school students as part of the GRPS's "more extensive regular curriculum."<sup>[8]</sup> (6a, 9a). Indeed, plaintiffs' trial counsel conceded the issue when he made the following statement:

We don't claim in this case that courses that are being offered in the nonpublic schools are not available in the public schools.

(Transcript, Vol VIIB, at 1167-1168). Accordingly, recognizing the internal inconsistency in the majority opinion, the dissent, after its extensive review of the trial court record, concluded that the class of students receiving the benefits of the instructional services offered included all gifted and needy students in the Grand Rapids community. (49a).

In like manner, the majority's primary effect ruling regarding the issue of direct, financial benefit is both internally inconsistent and contrary to the trial record. The majority ultimately concluded that the implementation of the Shared Time and Community Education programming resulted in a transfer of financial responsibility from the area nonpublic schools to the GRPS. (24a). Yet, that same majority found that "[t]he specific courses available through the elementary level Shared Time programs would *not otherwise be available* in any of the nonpublic schools, and are not required for graduation or progression to the next grade," (7a) (emphasis

[8]

As to the Community Education programming, the majority said, "all Community Education programs are otherwise available at the public schools, usually as part of their more extensive regular curriculum" (9a), and as to Shared Time programming it observed, "Shared Time is a program wherein the school district offers substantive courses *from its general curriculum* to nonpublic school students during regular school hours." (6a) (emphasis supplied).

supplied), and that "[o]f the nonpublic schools presently participating in the community [*sic*] Education program, none have ever provided an identical course to their students. In that respect, *Community Education courses do not represent substitutes for courses formerly offered at nonpublic schools.*" (9a) (emphasis supplied).

As Judge Krupansky concluded, the provision of Community Education and Shared Time services, at best, permitted "an expanded supplemental curriculum" to be offered at the nonpublic school facilities. (51a). Further, he concluded that there was "no evidence of record . . . that this expanded curriculum . . . resulted in an increase in the enrollment of the participating institutions." (51a). Indeed, the proofs submitted by the defendants at trial demonstrated that over a ten-year period of time (spanning four years prior to the programming in question, and six years following), the percentage of school age children attending area nonpublic schools remained essentially constant. No evidence was presented to suggest that the nonpublic schools with children participating in the programs "were economically distressed or that the challenged programs provided an economic lifeline to sectarian institutions." (51a).

Finally, in its primary effect analysis, the majority expressed its concern regarding the risk that religious indoctrination might occur as a result of the operation of the Shared Time and Community Education programs. (24a). Judge Krupansky's analysis on this particular point is concise, complete, and accurate:

Given the detailed and documented successful operational history of the Shared Time and Community Education programs, the majority's reliance upon an abstract 'potential for advancing religious doctrine[s]' is totally inapposite. No evidence of record supports a finding that

any teacher ever advanced religious views during the six-year period at issue. Rather, the record is replete with myriad affidavits and testimony of program instructors attesting to the contrary. The evidence of record, in its entirety, supports the conclusion that all instructors scrupulously confined their instruction to the secular.

(53a). Significantly, his analysis is confirmed by the majority's finding that "[t]here is no proof that any teacher in either Shared Time or Community Development [*sic*] classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion." (35a). Thus, the majority's concern in this regard is based upon hypothetical conjecture rather than record evidence.

In its apparent zeal to reject what it perceived as a threat to public education (40a), the majority in its analysis of the primary effect inquiry, rather than relying upon the factual record presented, instead premised its conclusion on a *per se*, geographic rule which would presumably invalidate all instruction on premises leased from religiously-oriented, non-public schools under all circumstances. Such an inflexible approach ignores the well-established precedents of this Court.

### C. The Excessive Entanglement Portion of the Test

Respecting the issue of excessive administrative entanglement, the majority, applying an abstract, "catch-22,"<sup>[9]</sup> *per se*

[9]

Based on its conclusion that there was a "real need for monitoring to insure that religious views are not advanced," the majority concluded:

Without such monitoring the programs run the risk of enhancing religious views. If courses are monitored, the programs are still infirm in that an excessive administrative entanglement is necessitated. In either case, the same ultimate result applies and the programs cannot be sustained.

(32a).

geographic rule of law, concluded that the provision of instruction on leased premises necessarily runs afoul under the entanglement analysis. Such an approach, petitioners submit, is contrary to the teachings of this Court in *Wheeler, Wolman* and *Regan*, and the better reasoned opinions of the lower courts, *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980), which clearly require a detailed analysis of the record evidence rather than the mechanical application of a *per se* rule. An analysis of the entanglement standard, consistent with the authorities cited above, requires a review of the "contacts" between the public and nonpublic school authorities in order to determine whether such contacts give rise to the "excessive entanglement" proscribed by the Constitution. To be sure, *some* "entanglement" between church and state, inherent in the test, is constitutionally permissible, *Hunt v. McNair*, 413 U.S. 734 (1973); *Mueller v. Allen*, . . . . U.S. . . . ., 77 L. Ed. 2d 721 (1983). The ultimate concern of the entanglement test is to avoid that "excessive" administrative entanglement between "the government and the religious authority" which would permit "the intrusion of either into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. at 614, 615.<sup>[10]</sup>

The operative facts adduced at trial identified two different types of administrative relationships which arose in the con-

[10]

In delineating the line of demarcation between permissible and excessive administrative entanglement, this Court has identified three pertinent areas of inquiry: (1) the character and purpose of the institutions benefitted, (2) the nature of the aid that the state provides, and (3) the resulting relationship between the government and the religious authority. *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*. Although space in this petition does not permit a detailed analysis of the first two criteria, suffice it to say that the "aid" in question (*i.e.*, educational opportunity) was given to *students* and not institutions. It was, from beginning to end, a child-benefit program.



text of the implementation and operation of the Shared Time and Community Education programs: (1) the supervision and evaluation of Shared Time and Community Education teachers by other public school administrators (*i.e.*, subject area supervisors), and (2) routine administrative contacts between the Shared Time and Community Education director and the nonpublic school administrators. The first of these relationships existed exclusively between *public* school employees, and not between the government and religious authorities.<sup>[11]</sup> The second of these relationships, though involving contacts between government and religiously-oriented nonpublic schools, nonetheless amounted to merely routine and infrequent contacts designed to meet the "logistical difficulties of extending needed and desired aid to all children of the community." *Wolman v. Walter*, 433 U.S. at 247 n.14. These limited administrative contacts between "church and state" did not result in the "intrusion of either [church or state] into the precincts of the other," the primary evil which the entanglement test was designed to prevent. *Lemon v. Kurtzman*, 403 U.S. at 614.

The evidence demonstrated that the contacts between Shared Time and Community Education officials and the nonpublic school administrators fell into three basic categories: (1) the dissemination of information regarding the educational services made available through the challenged programs; (2) the processing of requests for the receipt of such educational services; and (3) resolving scheduling problems and related matters which arose in the delivery of the services.

[11]

As noted by Justice Blackmun in *Wolman v. Walter*:

It can hardly be said that the supervision of *public* employees performing *public* functions on *public* property creates an excessive entanglement between church and state.

433 U.S. at 248 (emphasis supplied).

Recognizing that the majority failed to utilize an analysis consistent with recent decisions of this Court, Judge Krupansky observed that the majority predicated its conclusion of inevitable excessive entanglement "upon the theory that the Shared Time and Community Education programs created a *potential* for the advancement of religious ideologies generating a need to monitor the instructors to insure neutrality." (55a) (emphasis supplied). Utilizing this *per se* rule, the majority analyzed the constitutionality of the services in question in a manner "totally incongruent with the flexible nature of the establishment clause." (55a). As observed by Judge Krupansky:

The 'entanglement' test initially pronounced in *Lemon*, *supra*, presupposes the existence of a potential for the advancement of religious ideologies. It has typically been utilized where there is no record as to the presence or absence of religious advancement during the course of the challenged program's administration; in such instances the court simply identifies the entanglement which would be necessary to assure that the potential for advancement is not realized. *See, e.g., Nyquist, supra*.

• • • •

In the action *sub judice* no instructor during the 6-year period at issue has ever utilized or attempted to utilize the Shared Time and Community Education programs as a vehicle for religious indoctrination. There is no reason to believe that continued implementation of these challenged programs will deviate from this firmly established practice in the future. At this point in the history of the programs' operations, and in light of the exhaustive record, it is beyond peradventure that there never was a necessity to monitor the program in the past and accordingly every reason to believe that the need will not arise

in the future. Without such monitoring or need to monitor, no 'entanglement' manifests.<sup>[12]</sup>

(55a-56a).

## II.

### THE MAJORITY RULING UNDULY LIMITS THE FLEXIBILITY OF THE STATES IN MEETING THE EDUCATIONAL NEEDS OF ALL THEIR SCHOOL AGE CHILDREN AND IT IS IN DIRECT CONFLICT WITH THE DECISIONS OF MICHIGAN'S APPELLATE COURTS.

Under our federal system of government, the primary responsibility for providing educational opportunities for our nation's youth is reposed in the states and their local school districts. In exercising this responsibility, the states serve as laboratories for experimentation.

In fulfilling this responsibility, the states must, of necessity, come to grips with the relationship between themselves and nonpublic school children. While parents have a constitutionally protected right to send their children to nonpublic schools, including religiously-oriented nonpublic schools, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the state nevertheless has a legitimate concern about the quality of the education the child receives in nonpublic schools. Thus, the states may impose reasonable regulations upon such schools. Further, the

[12]

In similarly addressing the issue of political entanglement, Judge Krupansky concluded:

The foregoing rationale applies with equal force to the issue of 'political entanglement'. There is no evidence of record to support the proposition that any political divisiveness has resulted in response to the Shared Time and Community Education programs. (56a); See also note 13 *infra*.

states may provide some forms of assistance to nonpublic school students, including, *inter alia*, transportation, textbooks, and diagnostic, therapeutic and remedial services. See, respectively, *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Wolman*. Relationships between state educational policy and nonpublic school patrons are inevitable. In that context, it is for the states to determine what form those relationships will take under state law, as limited by the establishment clause, in our flexible federal system.

In Michigan, the legislature has made a conscious policy choice to authorize and fund the instructional services here at issue, including services on premises leased from religiously-oriented nonpublic schools. This choice reflects a legislative judgment to permit local public school districts to exercise this additional option, based upon their assessment of local conditions, in meeting the special educational needs of all the children in their communities.

As correctly stated by the Court of Appeals majority:

At the outset, this court recognizes that the State of Michigan, *through its legislature and courts*, has approved the expenditure of public funds for the purposes described in the statement of facts below. See *Traverse City School District v. Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971); *Citizens to Advance Public Education v. State Superintendent of Public Instruction*, 65 Mich. App. 168, 237 N.W.2d 232 (1975), *leave to appeal denied*, 397 Mich. 854 (1976) . . . .

(2a) (emphasis supplied).

In *Traverse City*, the Michigan Supreme Court considered the impact of Proposal C, an amendment to article 8, §2 of the Michigan Constitution approved by the voters in Novem-



ber, 1970, on various forms of aid to nonpublic schools or their pupils. With regard to shared time on leased premises, the Michigan Supreme Court concluded:

Premises occupied by lease or otherwise for public school purposes under the authority, control and operation of the public school system by public school personnel as a public school open to all eligible to attend a public school are public schools. This is true even though the lessor or grantor is a nonpublic school and even though such premises are contiguous or adjacent to a nonpublic school.

Nonpublic school students receiving shared time services under such circumstances are in the same position as such students at any other form of public school and are entitled to the same rights and benefits. Consequently, as already noted, the valid portion of Article 8, §2 does not prohibit funds for shared time under such conditions.

384 Mich. at 415, 185 N.W.2d at 19-20. The Michigan Supreme Court continued:

It should be needless to observe special circumstances not considered above may create unconstitutional religious entanglements, but shared time in and of itself does not.

384 Mich. at 417, 185 N.W.2d at 20.

In *Citizens to Advance Public Education*, the Michigan Court of Appeals, following the decision in *Traverse City*, held:

Consequently, we hold that where shared time secular educational programs operated on premises leased from nonpublic schools are under the authority and control of

public schools, are operated by public school employees, and are open to all students eligible to attend public schools, these programs do not offend the Michigan and United States Constitutions.

65 Mich. App. at 181, 237 N.W.2d at 238.

The Michigan legislature has authorized payment of state school aid funds to school districts for full-time and part-time public school students regardless of whether their public school instruction occurs on premises owned or leased by local school boards. (72a-73a). The section of the State School Aid Act of 1979 that appropriates state funds to school districts on a per membership pupil basis utilizes a statutory allocation formula without any total dollar limit. See Mich. Comp. Laws §388.1621 (1979) (amended 1982). Each year, the Michigan Department of Education applies the automatic statutory formula to the pupil memberships reported by each school district and distributes state funds to the school districts on that basis. There is no separate legislative appropriation for part-time public school instruction on premises leased from nonpublic schools. Accordingly, there is no annual political debate over the level of appropriation for such instruction. Indeed, the uncontroverted testimony of Robert Hornberger, a Michigan Department of Education employee, who supervises the distribution of state school aid to school districts, was:

I have not observed any political controversy in terms of attempts to change the statutes and administrative rules that provide school districts with discretionary authority to provide shared time instruction on premises leased from nonpublic schools and receive state school aid pay-

ments for part-time public school students who are also enrolled in nonpublic schools.<sup>[13]</sup>

(State Board of Ed Exhibit A, ¶8).

Pursuant to such state authorization and approval, the GRPS have elected to avail themselves of this educational alternative to reach out to all students in the community, including the thirty percent who otherwise attend nonpublic schools. (51a). While the state and local educational interests are significant, it must not be forgotten that the ultimate beneficiaries—the children—have been deprived of valuable educational assistance by the majority's decision. The significance of this educational benefit is exemplified by the poignant trial testimony of a mother of two children (who received remedial reading instruction through the Shared Time program), when she stated:

Q Without this kind of skill, your two sons would not have been able to learn as well as they are now learning, would they?

A Right. And not only learning, but their whole self-esteem was involved with this. If you could see the difference between the first year of first grade with my oldest son and the second year for first grade, there is just remarkable improvement. He was, his who[le] nature has come out. He's much more happy, much more adjusted. *I hate to think what would have happened to him, if he had not had this extra help.*

(Transcript, Vol VIIIB, at 1392-1393) (emphasis supplied).

[13]

Similarly, the proofs submitted at trial regarding the question of political divisiveness at the local level made clear that the provision of Shared Time and Community Education programming on leased premises did not, during the 6-year operational history, foster political divisions or controversies along religious lines.

The majority decision below invalidated this valuable educational supplement by applying a wooden, mechanical *per se* rule based simply on the location at which the educational services in question were provided. That decision represents a constitutional straitjacket which severely impedes the ability of the states to meet the educational needs of all their school age children in an effective manner. Shared Time and Community Education programming on leased premises, an example of the flexible genius of our federal system of government, should not be relegated to constitutional oblivion in the absence of review by this Court.

### III.

#### THE ERRONEOUS *PER SE* METHODOLOGY UTILIZED BY THE MAJORITY BELOW, BASED SIMPLY ON THE LOCATION AT WHICH THE EDUCATIONAL SERVICES WERE PROVIDED, HAS A POTENTIALLY ADVERSE IMPACT ON THE PROVISION OF TITLE I REMEDIAL SERVICES TO NONPUBLIC SCHOOL STUDENTS AT RELIGIOUSLY-ORIENTED NONPUBLIC SCHOOLS.

In *Wheeler*, this Court left unresolved whether Title I services could be constitutionally made available to nonpublic school students at nonpublic schools. In fact, Title I remedial services are often provided to nonpublic school students at religiously-oriented nonpublic schools as the educationally most effective method of delivering such services. See *Felton v. Secretary, United States Department of Education*, No. 78 CV 1750 (ERN) (E.D.N.Y. Oct. 4, 1983); *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980). There are currently several other cases pending in which the provision of Title I remedial services at religiously-oriented non-



public schools is being challenged under the establishment clause.

In this case, plaintiffs stipulated that they were not challenging the provision of Title I remedial services at religiously-oriented nonpublic schools. Petitioners make no claim that the outcome of this case is necessarily dispositive as to the constitutionality of providing such services at such locations. Title I is both legally and factually distinguishable from the instant case. However, the majority's erroneous *per se* methodology has a potentially disastrous impact on the validity of providing Title I services at nonpublic schools in the current Title I litigation. Further, the decision below, based simply on the location at which the services were offered, invites additional Title I litigation under the establishment clause.

This case deserves review by this Court as a vehicle for instructing the lower courts as to the proper methodology to be employed in deciding cases involving the provision of public school instructional services at religiously-oriented nonpublic schools. This Court, in deciding this case, can inform the lower courts that these establishment clause cases must be decided on the basis of the factual record made at trial, as in *Harris and Felton*, rather than by the mechanical application of *per se* rules concerning the location at which educational services are provided, as happened here.

#### IV.

#### THE MAJORITY RULING BELOW MERITS REVIEW BY THIS COURT BECAUSE OF ITS FAILURE TO LIMIT PLAINTIFFS' TAXPAYER STANDING SOLELY TO CHALLENGES OF LEGISLATIVE APPROPRIA- TIONS AS REQUIRED BY THIS COURT'S DETER- MINATIONS IN FLAST AND VALLEY FORGE.

The challenged programs in this matter are entirely funded by state appropriations. Since Plaintiffs do not appear as parents of children involved in the programs or otherwise make a claim for any personal injury, the Court of Appeals majority determination that plaintiffs have standing to litigate this matter can only be sustained based upon plaintiffs' status as state taxpayers.

The majority's standing ruling must be tested against the taxpayer standing criteria defined by this Court in *Flast v. Cohen*, 392 U.S. 83 (1968), and, most recently, in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

In earlier pronouncements this Court had held that, absent some actual injury resulting from the claimed illegal conduct, taxpayer status provided no article III standing to challenge the validity of governmental action in federal courts. This was true both of federal taxpayers, *Frothingham v. Mellon*, 262 U.S. 447 (1923), and state taxpayers, *Williams v. Riley*, 280 U.S. 78 (1929).<sup>[14]</sup>

One of these criteria limited the taxpayer's standing in *Flast*, to an attack on congressional expenditures under the taxing

[14]

A different and unique standing exists for municipal taxpayers as noted in *Frothingham*, 262 US at 486-487.

and spending clause of article 1, §8. The *Flast* opinion noted that "[t]his requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts." 392 U.S. at 102.

Recognizing that *Valley Forge* had "firmly established the standing limitation as to a federal taxpayer" Judge Krupansky determined:

By analogy, a state taxpayer, as in the case at bar, must challenge appropriations derived from the state's constitutional equivalent to Art. I, §8 of the United States Constitution.

(62a).

Observing that the Michigan legislature had enacted appropriations which "authorize[] payment of state school aid funds to local boards of education for part time students receiving shared time instructions," Judge Krupansky reasoned:

Had Plaintiffs challenged the constitutionality of these Michigan legislative enactments, they may possibly have invoked taxpayer standing under the criteria of *Flast* and *Valley Forge*. . . . The instant taxpayers, as those in *Valley Forge*, have simply challenged executive decisions rather than exercises of congressional power. The complaint, as framed, fails to invoke Article III jurisdiction and the cause of action should have been dismissed for this reason.

(62a-63a).

The majority below, although citing *Flast*, (3a), makes no reference to *Valley Forge*, and fails to explain how plaintiffs' taxpayer status in this matter provides article III standing

where, as here, plaintiffs challenge an executive decision rather than a legislative appropriation. In effect, the majority's omission serves to void the strict limitation placed on taxpayer standing established in *Flast*, and confirmed and applied in *Valley Forge*.

Accordingly, petitioners respectfully submit the majority's decision below conflicts with *Flast* and *Valley Forge*, and should be reviewed by this Court.

### CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the Sixth Circuit Court of Appeals rendered herein on September 23, 1983.

Respectfully submitted,

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**APPENDIX**

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Dated: December 14, 1983



Sep 26 1983

Nos. 82-1600-02

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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Americans United for Separation  
of Church and State, et al.,  
Plaintiffs-Appellees,

v.

The School District of the City of  
Grand Rapids (82-1600),  
Defendant-Appellant,  
Irma Garcia-Aguilar, et al.,  
(82-1601),

Intervenor-Defendants-  
Appellants,  
Phillip Runkel, et al., (82-1602),  
Defendants-Appellants.

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Appeal from the  
District Court for  
United States  
District Court for  
the Western  
District of Michigan,  
Southern Division.

Decided and Filed September 23, 1983

Before: EDWARDS, Chief Circuit Judge, LIVELY and  
KRUPANSKY, Circuit Judges.

EDWARDS, Chief Circuit Judge, delivered the opinion of  
the court in which LIVELY, Circuit Judge, joined. KRUPAN-  
SKY, Circuit Judge, (pp. 41-58) delivered a separate, dissenting  
opinion.

EDWARDS, Chief Judge.

## INTRODUCTION

The First Amendment to the Constitution of the United States provides in its first clause: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, . . ." The United States Supreme Court has established that this amendment applies with full force to the various states of the union. *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

At the outset, this court recognizes that the State of Michigan, through its legislature and courts, has approved the expenditure of public funds for the purposes described in the statement of facts below. See *Traverse City School District v. Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971); *Citizens to Advance Public Education v. State Superintendent of Public Instruction*, 65 Mich. App. 168, 237 N.W.2d 232 (1975), leave to appeal denied, 397 Mich. 854 (1976); 1976 MICH. PUB. ACT 451, § 331; 1979 MICH. PUB. ACT 94, § 331; MICH. COMP. LAWS ANN. § 380.331 (1976 & Supp. 1983); MICH. COMP. LAWS ANN. § 388.1601 (1979 & Supp. 1983); MICH. STAT. ANN. § 15.1919(902) (1976 & Supp. 1983); MICH. STAT. ANN. § 315.4331 (1979). On complaint, however, it is the responsibility of the federal courts (ultimately, of course, of the Supreme Court of the United States) to determine whether specific tax supported benefits provided by state law violate the establishment clause of the Constitution of the United States.

## THE NATURE OF THIS CASE

This is a taxpayers' suit filed by various citizens of the City of Grand Rapids contending that a Shared Time and Com-

munity Education program operated by the School District of the City of Grand Rapids in school buildings owned and operated by various religious denominations in Grand Rapids is an unconstitutional "establishment" of religion and its method of operation requires an unconstitutional entanglement of public and religious affairs. The case was heard before District Judge Benjamin Gibson in Grand Rapids, Michigan, in an eight-day trial. After Judge Gibson recused himself, the case was transferred to District Judge Richard Enslen who, by agreement of the parties, decided the case on the basis of transcript testimony and other written documentary evidence which had been submitted to Judge Gibson.

Judge Enslen dismissed plaintiff Americans United for Separation of Church and State and returned judgment in favor of the individual plaintiffs. A stay application was then filed by appellant before the District Judge. He denied the request. On appeal, this Circuit by majority vote affirmed the denial. A stay application was then filed with Circuit Justice Sandra Day O'Connor and likewise was denied.

On this appeal the following parts of the program are at issue before this court: 1) Shared Time classes at the elementary level, 2) Community Education classes at the elementary level, and 3) one remedial math Shared Time class at the secondary level. All classes concerned in this case were held in classrooms in parochial schools.

Judge Enslen held that the individual plaintiffs have standing to attach these programs under the establishment clause. We agree with his reasoning and result on this issue. See *Flast v. Cohen*, 392 U.S. 83, 103-06 (1968); *McCollum v. Bd. of Education*, 333 U.S. 203 (1948); *Everson v. Bd. of Education*, 330 U.S. 1 (1947). He also concluded that public tax support for these programs in the parochial schools, in spite of measures taken to eliminate within the specific classrooms both

religious teaching and religious symbolism, had an impermissible effect of advancing the various religions involved and resulted in excessive entanglement of government and religion.

### STATEMENT OF FACTS

After full briefing and appellate hearing, we have now reviewed the lengthy record and the briefs filed by the respective parties and find that Judge Enslen's statement of facts should be adopted by this court. It follows:

Although the parties, as expected, propose differing interpretations of the facts and urge opposing views of the legal consequences which flow therefrom, the Court, after careful consideration of the entire record, believes that the salient facts underlying this litigation are largely undisputed. The basic facts are set forth below; more detailed facts will be elaborated within that section of the Opinion to which they pertain.

At the outset it should be noted that, throughout this proceeding, the term "shared time" has been used to describe both the Shared Time and the Community Education programs. Individually and collectively both programs have enjoyed a steady growth since their inception. For the 1978-79 school year, there were 9,494 nonpublic school students enrolled in the combined programs; the payment of state school aid funds attributable to those students totalled \$1,397,577.20. By the 1981-82 school year, the programs had been extended across county lines, the number of participating nonpublic school students exceeded 11,000, and state aid approached \$6,000,000. Besides being offered through the Defendant School District, both programs contain additional common characteristics which will be discussed immediately below.

Thereafter, because Shared Time and Community Education are individual and distinct educational programs, they will be discussed separately.

In both the Shared Time and Community Education programs, Defendant School District utilizes a standard form lease to gain access to nonpublic school classrooms and other facilities. The lease specifies a rental charge of \$6 per class per week at the elementary schools, and \$10 per class per week at the secondary schools. In none of the leases is there any mention of the particular room, space or facility which the instrument governs, and they do not, by their terms, restrict public school employees or students from occupying or using any facility within the nonpublic schools. Indeed, teachers' rooms, libraries, lavatories and similar facilities used in connection with the let premises are generally made available to the School District.

No crucifixes, religious symbols or artifacts may be displayed in leased facilities. Before any nonpublic school facility may be utilized by either of the public school programs, it is necessary to "desanctify" the facility to ensure that no such symbols are exhibited. In many instances, religious symbols or artifacts, or both, exist in adjoining corridors, surrounding rooms, or other facilities used in connection with the leasehold.

The School District requires its instructors to post signs within the class area designating it as a public school classroom. At least one instructor testified that she carried the "public school" sign with her as she moved throughout the nonpublic schools. There are no signs posted outside of the nonpublic schools indicating that public school courses are being offered therein, or that the facilities serve as a public school annex.



Almost without exception, those students attending Shared Time and Community Education courses in facilities leased from a nonpublic school are the very same students who attend that particular nonpublic school during the regular school day. Thus, there is a virtual identity between students receiving Shared Time or Community Education instruction at any given nonpublic school and the students regularly attending that nonpublic school.

Shared Time and Community Education instruction involves 470 full and part-time teachers. Every Shared Time instructor is employed in accordance with the ordinary hiring procedures adopted by the School District for the City of Grand Rapids. A significant portion of the Shared Time instructors previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed. The majority of Community Education offerings on facilities leased from a nonpublic school are taught by instructors employed full time by the very same nonpublic school.

Shared Time is a program wherein the school district offers substantive courses from its general curriculum to nonpublic school students during regular school hours. As noted in *Traverse City School District v. Attorney General, supra*, at 407, n.2, such shared time classes have been offered in various Michigan school districts for more than 60 years. In their original form, shared time courses provided public school instruction for nonpublic school pupils at public school sites in subjects widely regarded as being secular. Typical shared time course offerings included mathematics, reading, physical education and art. Perhaps the most striking difference between the Shared Time program at issue, and the prototypical pro-

gram is that the instant arrangement is conducted *entirely* within the participating nonpublic schools in facilities leased by the School District. This Grand Rapids variation on the shared time arrangement was initiated in 1976, following a Michigan Court of Appeals decision upholding the constitutionality of shared time instruction on leased premises under conditions of public school control. *Citizens to Advance Public Education v. State Superintendent of Public Instruction, supra*.

During the 1981-82 academic year, forty-one private schools participated in the Grand Rapids Shared Time program. With the exception of physical education, industrial arts, music and art, the educational opportunities offered through the program are, in the main, supplementary to the core curriculum of the nonpublic schools. The basic Shared Time course titles include: Art, Music, Physical Education, Industrial Arts, Educational Park, Remedial and Enrichment Mathematics, and Remedial and Enrichment Reading. Various other courses have been offered through Shared Time instruction; they include the following: Humanities, Language Arts, Home Economics, Science, Spanish, French, Latin, Business, Social Studies, Yearbook, Calculus, Creative Writing, Psychology, Journalism, Criminology, and Advanced Biology. The specific courses available through the elementary level Shared Time programs would not otherwise be available in any of the nonpublic schools, and are not required for graduation or progression to the next grade. The participating private secondary schools, however, require for graduation a course in physical education. Such courses are offered at these schools *only* on a Shared Time basis.

Notwithstanding the numerous Shared Time courses, the amount of time in which the average nonpublic



school student receives such instruction is a relatively small portion of that student's total educational experience. There was testimony that ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction. Typically, a nonpublic school student does not participate in every Shared Time course offered at his school.

In the early 1970's, the School District of the City of Grand Rapids instituted the Community Education program in the Grand Rapids Public Schools. Beginning in approximately 1975, that program, which offers to students a diverse array of educational and other enrichment opportunities, was, offered for the first time, at facilities leased from those nonpublic schools which elected to participate. Whenever offered, Community Education courses are taught by Grand Rapids public school employees under the supervision and control of the public schools. Classes offered at nonpublic school sites are now, and have always been, conducted in facilities leased from the participating private institutions.

Unlike Shared Time, the Community Education offerings at issue are scheduled outside of regular school hours. Participating schools, especially those at the elementary level, host "after school" or "leisure time" Community Education courses which, as the name implies, commence at the conclusion of the regular school day. Additionally, at the participating nonpublic high schools, Community Education courses are offered immediately preceding the regular school day, during the "zero hour." Many such "zero hour" classes offer substantive rather than enrichment courses; indeed, certain of the secondary level Community Education courses may be taken for credit toward graduation. "Zero hour" courses include: Typing, Business Machines, Computer Programming,

Photography, Retailing, Communications, Bookkeeping and Astronomy.

Community Education instruction is completely voluntary and will be offered only in the event that twelve or more students are enrolled. Because of this rule of twelve, a well known teacher able to attract students is essential to the establishment of a successful Community Education program. For that reason, and with respect to Community Education only, the School District accords a preference in hiring to instructors already established with students in the building where the nonpublic course will be offered. Currently, there are over 300 Community Education instructors employed on a part-time basis by the School District of the City of Grand Rapids. The majority of those part-time Community Education instructors are employed full time by the situs school, whether public or private. As a consequence, virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school.

Of the nonpublic schools presently participating in the community Education program, none have ever provided an identical course to their students. In that respect, Community Education courses do not represent substitutes for courses formerly offered at nonpublic schools. Although certain Community Education courses offered at nonpublic school sites are not offered at the public schools on a Community Education basis, all Community Education programs are otherwise available at the public schools, usually as a part of their more extensive regular curriculum.

Finally, because a participating nonpublic school's calendar is not necessarily coterminous with that of the

public school's, the Defendant School District has attempted to accommodate the nonpublic schools. For example, it rearranges schedules during religious holidays not recognized by the public schools. At the elementary level, Community Education courses span a twelve week term of shorter duration than the regular nonpublic school semester. At the secondary level, all Community Education programs generally follow the public school calendar.

### The Nonpublic Schools

Approximately forty of the Grand Rapids area nonpublic schools which have elected to participate in the Shared Time and Community Education programs are, by their own admission, "religiously oriented." The challenged programs have, at one time or another, been offered in facilities rented from 28 Roman Catholic schools, 7 Christian schools, 3 Lutheran schools, 1 Seventh Day Adventist school and 1 Baptist school. For purposes of general discussion, most of those schools can be readily divided on the basis of religious affiliation into three categories, to wit: Roman Catholic, Christian, and Lutheran. Plaintiffs introduced abundant evidence tending to demonstrate that a substantial portion of the function of the participating nonpublic schools' "functions are subsumed in the religious mission. . ." *Hunt v. McNair*, 413 U.S. 734, 743, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973).

#### A. The Catholic Schools

The elementary and secondary Roman Catholic schools participating in the challenged programs provide their 6,233 students with an opportunity to receive religious

instruction. Sister Marie Heyda, author of the book *Catholic Central and West Catholic High Schools*, candidly testified, that the following sentence in her book states the philosophy of education in Catholic schools:

*Certainly religion and the values of the spiritual life must always be an integral part of the atmosphere of the Catholic high school for in the modern age they are the only reason for its being. Id. at p. 80. (Emphasis supplied).*

The *St. Jude School Parent Handbook*, contains this typical statement of the philosophy of Catholic education:

A God oriented environment which *permeates* the total educational program.

• • •

Opportunities to pray, worship and celebrate as members of a Christian community.

A Christian atmosphere which guides and encourages participation in the church's commitment to social justice.

A continuous development of knowledge of the Catholic faith, its traditions, teachings and theology. (Emphasis supplied).

Each of the Catholic schools is governed by its own Board of Education, normally composed of the pastor and lay members, elected by constituents of the parish with which the school is associated. Although there is no such requirement, nearly all Board members are adherents of the Roman Catholic religion.

Typically, on a daily basis the Catholic schools include some form of prayer or religious observance; on a weekly basis they include actual attendance at religious services. Moreover, the affidavit of Ronald J. Cook, Superintendent of Schools for the Roman Catholic Diocese of Grand Rapids, states at paragraph 21 that: ". . . It is the policy of the Grand Rapids Catholic schools ordinarily to require students to attend religious instruction classes and religious services either at the Catholic school or at the church of his own faith if the student is not Catholic." No less than 85 percent of the students and 90 percent of the instructors at the combined schools are Catholic.

### B. The Christian Schools

Each of the five elementary and one secondary Christian school is operated by the Grand Rapids Christian School Association, an association composed of parents and others who support Christian education. Membership in the Association is *restricted* to those who *subscribe* to a *doctrinal Basis*. The Basis, which is contained within the Association's Bylaws, provides:

*Section 1.3 Basis.* The supreme standard of the Association shall be the scriptures of the Old and New Testament, herein confessed to the the [sic] infallible Word of God, as these are interpreted in the historic Reformed confessions: The Belgic Confession; Heidelberg Catechism, and Canons of Dort.

Acknowledging that that [sic] these Scriptures, in instructing us of God, ourselves, and God's creation, contain basic principles authoritative and relevant for education, we hold that:

(a) The authority and responsibility for education (sic) children resides in the parents or guardians of the children and not in the state or the church. Parents, however, may delegate their authority to those who can competently carry out this God-given parental right.

(b) The primary aim of a Christian parent is (sic) securing the education of his child should be to give him a Christian education—that is, an education whose goal is to equip the child for living the Christian life as a member of the Christian community in contemporary society.

(c) Christian parents, when delegating the authority for educating their children, should delegate it to those institutions which seek to provide Christian education for the student.

(d) The responsibility for maintaining such institutions rests on the entire Christian community.

(e) The Christ proclaimed in the infallible Scriptures is the Redeemer and Renewer of our entire life, thus also of our teaching and learning. Consequently in a school which seeks to provide a Christian education it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but *the Word of God must be an all-pervading force in the educational program.* (Emphasis Supplied).

The Association elects a Board of twelve trustees to operate the schools and make policy decisions. Currently, all twelve trustees are members of the Christian Reformed Church. Article VI of the Bylaws grant to the trustees



authority with respect to educational policy:

*Section 6.1 Educational Authority.* The Board of Trustees of the Association shall have general and plenary authority, power [sic] and responsibility with respect to the educational policies of its schools, including, without limitation, the following:

(a) To determine and establish the curricula and courses of study to be taught in its schools;

(b) To establish grades and departments in its schools;

(c) To hire and contract with principals, teachers, librarians and other faculty [sic] and staff, and assign such persons to its [sic] schools;

(d) To specify, purchase and furnish books and other educational materials, supplies and equipment;

• • •

(g) To establish policies for interschool functions and relationships;

(h) To develop, establish and carry into effect plans for the development of Christian education in those areas which are or may be served by the Association.

(i) To make rules and regulations relating in any way to the administrative and educational policies to be followed in its schools.

The evidence established that for the past three school years 88 percent of the students of the Grand Rapids

Christian School Association belonged to the Christian Reformed Church or the Reformed Church in America. An informational brochure distributed by Creston-Mayfield Christian School, a member of the Grand Rapids Christian School Association, relates that: "Christian parents who express their commitment to Christian education are welcome to enroll their children. They will be accepted without regard to race, color, national or ethnic origin." The brochure's conspicuous omission of any reference to "religion" is not inadvertent. Indeed, the application form for admission to the Christian School Association requires the parent to either subscribe to the Basis or to agree to have his children taught according to the Basis principles.

The *Seymour Christian School Staff Handbook*, at section seven, discusses the attributes of a Christian teacher as follows:

#### A CHRISTIAN TEACHER

1. A Christian teacher is first of all a servant of his Lord and Savior. His concepts of God, man, and the world find their authority in the Bible. His doctrinal stance requires that he interpret his subject matter from a Christian point of view. His emotional maturity, intellectual competency, and spiritual vibrancy is obvious. His task is to teach God's children about God's world in the light in God's word.

• • •

3. The Christian teacher sees his students as image bearers of God who will be active in His Kingdom now and forever. He will use *every means available* to give his students this perspective. He will be a living example of Christian behavior. He will con-

spicuously teach Christian virtues. *He will promote a Christian sense of values in his classroom* by teaching respect for authority, respect for the property of others, desire to cooperate, enthusiasm for work, concern for others, and most importantly, submission to the Lordship of Christ. The teacher will be sensitive to his student's academic and spiritual needs. (Emphasis supplied.)

The majority of instructors employed by the Grand Rapids Christian School Association are members of the Christian Reformed Church.

### C. The Lutheran School

The only Lutheran school presently participating in the Shared Time and Community Education programs is Immanuel-St. James Lutheran School. The educational philosophy of that institution is perhaps best expressed in the "Credo on Christian Education" contained within the *Immanuel-St. James Lutheran School Handbook*:

#### IMMANUEL-ST. JAMES CREDO ON CHRISTIAN EDUCATION

WE BELIEVE that Christian education is a vital aspect of the Church's mission, commanded by God through the Great Commission.

WE BELIEVE that Christian education is directed toward the total development of people, providing for their spiritual, intellectual, emotional, social and physical needs.

WE BELIEVE that Christian education is a responsibility of all believers toward all people.

WE BELIEVE that the purpose for Christian education is to teach the Christian faith through

- (a) instruction in God's word
- (b) living in relationships of love and forgiveness.

WE BELIEVE that an effective program of Christian education is based on a distinct theology and determines its curriculum by taking into account current world conditions.

WE BELIEVE that effective education is achieved as quality learning programs relate the Christian faith in every aspect of life.

WE BELIEVE that the family exerts much influence on a child's total education, and that the church must equip adults for their important role in Christian education.

This philosophy is reaffirmed in a section titled: "The Goals of Education", contained in the same booklet which states, in part, that the goals of Lutheran education involve:

1. Leading the child to faith in the Lord Jesus Christ, and keeping him/her in that faith to eternal life in heaven.
2. Helping the child in Christian growth in all relationships of life, such as the family, the Church, the State, the relationship of friendship, of employment and labor, of art and culture.

Immanuel-St. James Lutheran School is a joint effort of the members of Immanuel and St. James Lutheran congregations. The Voters Assemblies of each of these congregations has established a joint Board of Education to direct and conduct the affairs of the school. This joint Board of Education consists of members elected from each participating congregation.

Immanuel-St. James Lutheran School is housed in two separate buildings, located on a site which adjoins a Lutheran church. Prayer and religious instruction are part of the daily curriculum at the school. In addition to the daily formal study of the Lutheran faith and daily devotions, the staff and the pupils assemble on a weekly basis, as well as on days of special religious import, for devotional services. Students in the school are expected to be present during religious instruction and services.

At page 6 of the *Immanuel-St. James Lutheran School Handbook* there appears a section captioned: "Distinctive Features of Immanuel-St. James Lutheran School", which reads:

#### 1. GOD AND HIS WORD ARE CENTRAL.

The Holy Bible influences all lessons and activities in our Christian Day School. Through Scripture the Holy Spirit works to increase the Child's understanding of himself, his purpose, his destiny, and his Lord.

#### 2. THE CHILD RECEIVES THROUGH, (sic) SYSTEMATIC INSTRUCTION IN THE TEACHING OF CHRISTIANITY.

Christian teachers lead the child in daily study of God's word and in prayer and worship. Particular attention

is given to clarifying the story of sin and salvation. In addition, the pupil is trained to practice his Christianity. Guided by teachers and fellow pupils, he grows in Christian knowledge, attitude and conduct.

#### 3. THE CHILD RECEIVES A THOROUGH TRAINING IN THE COMMON SCHOOL SUBJECTS.

The child is instructed in all the common school branches of learning, as prescribed by the state. But all such instruction is given from a Christian point of view. The child is thus protected from the dangers of a purely secular schooling.

#### 4. THE CHILD LIVES IN A CHRISTIAN ENVIRONMENT.

The devil constantly seeks to undermine the Christian's faith. The importance of school environment, therefore, is not to be under estimated. True, misunderstandings and incidents of misbehavior and conflict will occur in this school also. But the power of sin is lessened when Christian teachers and children live in intimate relation with their Lord, and in loving concern for one another's growth in holy living.

#### 5. THE CHILD GROWS INTO HIS CHURCH.

More and more active workers in the local congregation and in the church at large are needed. Leaders, pastors, teachers, and lay persons -- must be developed to guide the church's work. Members who remain faithful to the Lord, and who are wise stewards of their time, abilities, and possessions, are essential. Immanuel-St. James Lutheran School trains children for just such roles.



With respect to the admission policy, Kraig Johnson, the principal of Immanuel-St. James, candidly admitted that preference is given to members of the Lutheran faith. In that regard, paragraph 7 of the official admissions policy for the school states:

7. Members of the sponsoring congregations are given first opportunity to enroll their children. Children of non-member families are accepted on the following basis and availability of space:

- a) children from sister congregations;
- b) children from other Lutheran churches;
- c) children from other Christian schools;
- d) and others who desire a Christian education.

The effect of that admissions policy on the enrollment of Immanuel-St. James is substantial. Currently, by Mr. Johnson's own estimate, approximately six-sevenths of the students enrollment are Lutheran. Moreover, instructors keep attendance records on church and Sunday school attendance, and perfect church and Sunday school attendance awards are given at the end of each school year.

An individual interested in obtaining a teaching position at Immanuel-St. James Lutheran School must meet stringent requirements. Those are stated concisely at page 8 of the *Immanuel-St. James Lutheran School Handbook*:

The teachers of Immanuel-St. James Lutheran School meet all the requirements of Synod for its parochial school teachers and the requirements of the State of Michigan, Department of Education. The teachers have

pledged themselves to use every opportunity for continued spiritual and professional growth. They are personally interested in the complete welfare of each individual child. Our teachers have always been known to give unselfishly of their time to students and parents who have special needs.

The District Judge measured the impact of this program upon constitutional concerns under the basic three-fold test set forth in Chief Justice Burger's opinion for the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra*, at 674.

403 U.S. at 612-13.

Dealing with the secular purpose aspect of the crucial tests, Judge Enslen held: "The purpose of the Shared Time and Community Education programs are manifestly secular. Inquiry into the purposes of the School District in establishing the programs, and the Michigan legislature in authorizing the necessary funds, provides no basis to form a conclusion that there was any purpose or intent to advance religion unconstitutionally."

Our review of this record convinces us that these conclusions are not "clearly erroneous" and we affirm.

As to the second test, the District Judge arrived at a different conclusion. That test is stated as whether the legislation attacked is one which "neither advances nor inhibits religion . . ." On this issue the District Judge first reviewed arguably applicable Supreme Court case law: *Meek v. Pittinger*, 421 U.S. 349 (1975); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Commissioner of Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947).

The District Judge then held:

In assessing the instant matter, I observe that the Shared Time and Community Education programs have a number of relevant characteristics in common with the "dual-enrollment" program, which was permanently enjoined by this Court in *Americans United for Separation of Church and State v. Porter*, *supra*. In each of the programs, a lease was the instrument through which the public school district gained access to nonpublic school facilities. One effect, in both cases, permitted nonpublic school students to attend public school classes without ever leaving the nonpublic school or mixing with public school students. A second common feature is the complete identity of the student body in the "public school" classes and the nonpublic schools. As in *Porter*, all of the students in Shared Time and Community Education classes are full-time students of the nonpublic schools. Since there are, in fact, no public school students participating in the instant programs, the nonpublic schools are permitted to retain their private religious character. Certainly, there are other similarities and differences between the two programs. However, these two features are significant in that they demonstrate that each of the programs has a constitutionally impermissible effect. Ac-

*cord*, *Americans United For Separation of Church and State v. Oakey*, 337 F Supp 545 (D Vt 1972); *Americans United For Separation of Church and State v. Paire*, 359 F Supp 505 (D NH 1973); *Fisher v. Clackamas County School District*, 13 Or App 56, 507 P 2d 839 (1973); *Americans United for Separation of Church and State v. Beechwood Independent School District*, 369 F Supp 1059 (ED Ky 1974).

In assessing whether the Shared Time program has a sufficiently secular effect, the Court must determine, among other things, whether the class benefited is sufficiently broad. Even when genuinely motivated by an undeniably secular purpose, government must not act so as to support a narrow group of religiously segregated beneficiaries. The challenged programs impact upon a very narrow religious class of beneficiaries. The narrowness of the benefited class was a crucial factor in *Nyquist* in striking down the tax relief program for parents of nonpublic school children where parochial school children composed over 80 percent of the benefited class. Conversely, the breadth of this class has also been a determinative factor in sustaining aid to nonpublic school pupils, particularly at the university level. *Wolman v. Walter*, *supra*. The Grand Rapids program, by distinction, directly benefits nonpublic school students, and hence nonpublic schools, while at the same time it excludes members of the public at large. Whereas public school students are assembled at the public facility nearest to their residence, students in religious schools are assembled on the basis of religion without any consideration of residence or school district boundaries. With respect to the exclusion of public from Shared Time classes, a mere statement in the lease that such programs are open to all, does not, as the evidence plainly demonstrated, make the program open to the public.



Despite Defendants' assertions to the contrary, the Court finds that beneficiaries are wholly designated on the basis of religion and, as will be discussed more fully below, the programs as currently implemented also carry with them the destructive potential for political divisiveness. Many of the Shared Time instructors previously taught at the same nonpublic school to which they have now been assigned as public employees. In the Community Education program, the vast majority of instructors are also employed full time by the same nonpublic school. Without questioning the good faith and integrity of the teachers, this Court cannot ignore the potential for advancing religious doctrine under these conditions. Notwithstanding these concerns, a larger problem lies in the fact that challenged courses are conducted in the sectarian atmosphere of the religious schools. As specifically addressed in *Nyquist*, there is a deeper concern that the atmosphere of the schools, rather than actions of the instructors, will have an effect which advances religion. When courses are offered within the abdomen of a sectarian institution to students who are brought together for a religious mission, there is a distinctly impermissible constitutional effect.

Another glaring nonsecular effect of the programs is that financial responsibility for teaching Physical Education, Art, Music and all of the other available course offerings has been transferred from the private religious schools to the taxpayers. By entering into a legalistic agreement with the parochial schools, the public schools have gained more than access to facilities. They have conferred substantial financial benefits upon those religious institutions by employing and paying from tax funds the numerous instructors who teach subjects in the leased classrooms. Without any change in the character of the student body or infusion of any students

from other schools, the programs have undeniably rendered direct benefits, both financial and otherwise, to the sectarian institutions. Such an effect is clearly irreconcilable with the dictates of the Establishment Clause.

The relative merit and benefits of the Shared Time and Community Education programs are not issues before the Court. The issue here is whether this composition of students and teachers, when combined in the sectarian atmosphere of a religious school, fosters an impermissible effect under the Establishment Clause. For the reasons discussed herein, I hold that the challenged programs do violate the First Amendment.

Because we think the second *Lemon* test, "advances or inhibits religion," and the third, "excessive entanglement of government with religion," are impossible completely to separate in the context of this case, we shall reserve our analysis and decision until we have the District Judge's response to both before us.

As to whether the currently disputed Grand Rapids School Board program represents an excessive entanglement of government with religion, the District Judge held as follows:

### The Entanglement Problems

Created out of a desire to minimize government intrusion into the realm of religion, the third aspect of the constitutional standard requires that the program under scrutiny must avoid "an excessive government entanglement with religion." *Walz v. Tax Commissioner, supra*, at 674. Generally, excessiveness is a question of degree and is often referred to as "administrative entanglement." Some governmental activity that does not have an imper-



missible religious effect may nevertheless be unconstitutional, if in order to avoid the religious effect government must enter into an arrangement which requires it to monitor the activity. *Lemon v. Kurtzman*, *supra*; *Levitt v. Committee for Public Education*, *supra*.

An additional and somewhat different form of entanglement, "political entanglement", was first enunciated in *Lemon v. Kurtzman*, *supra*:

A broader base of entanglement of yet a different character is presented by the divisive *political potential* of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the *usual political campaign techniques* to prevail. Candidates will be forced to declare and *voters to choose*. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was to protect. 430 U.S. at 622. (Emphasis supplied).

I have already decided that the educational programs at issue benefit narrow groups of citizens on the basis of religion. Because Grand Rapids is a religiously pluralistic community, there are already religious divisions in that city. In preparation for the March, 1980, school millage campaign, the Grand Rapids Board of Education published *Citizens Handbook Millage 80*, which was distributed as a factual source book to campaign workers. In that booklet the Board of Education has made a purposeful effort to influence favorably the taxpayers sending children to nonpublic schools on the basis of benefits conferred under the programs challenged herein. In attempting to align voters with its cause, the School Board has unquestionably fostered political division along religious lines in disregard of the warnings in *Lemon*. The next Grand Rapids school millage election is scheduled for 1983. Obviously the *potential* for political division on the issue of financial aid to religious schools appears imminent. *Lemon* clearly addresses the problem confronting the parties here:

The *potential* for political divisiveness related to religious beliefs and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. The Rhode Island District Court found that the parochial school system's 'monumental and deepening financial crisis' would 'inescapably' require larger annual appropriations subsidizing greater percentages of the salaries of lay teachers. Although no facts have been developed in this respect in the Pennsylvania case, it appears that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program. 403 US at 623-624. (Emphasis supplied).

One can scarcely criticize the Defendant School District. Given the realities of the national and state economies (not to mention the curious Michigan formula for financially supporting its public schools), extra voted millage is the *only* way a school district can keep its school doors open. Obviously, appealing to the voters and importuning them to favorably consider a new millage proposal requires the District to utilize all the persuasion, and all the public relations hyperbole, that it possesses. It is sensible, then, for the district to appeal to those voters who have opted to send their children to private schools. While sensible, it also is a political appeal to the voting community. As such, it invites opposition, as do all political propositions.

In oral argument counsel for Defendant School District urged this Court to consider the fact that, although a potential for political divisiveness might exist, such a division had not occurred. Such an argument ignores the existence of the instant suit and the affidavits of four of the Plaintiffs. Other divisiveness occasioned by the *Citizens Handbook* is only surmise, and such speculation lies without the purview of this Court. Within the ambit of my decision however, is the inescapable conclusion that such political appeal, as contained in the handbook, creates the *potential* for political division. Such a tendency has long been constitutionally disfavored.

Indeed, the potential for political divisiveness is altogether too evident. The School District "campaigned" (a political ingredient as ancient as politics itself) for a successful millage in 1980, and included the appeal to the nonpublic school parents. Some candidates for the school board advertised their approval for the millage, including approval of the inclusion of the Shared Time and Community Education programs. This is not a potential for

political division but rather historical fact. Voters may also disagree on the issue of the "profitability" of the suspect program. Similarly, the spectre of Board candidates dividing voters over the program haunts the political process.

The potential problems include the 1983 millage election and whether the Board will again appeal to non-public school parents. Should one of the Plaintiffs be a school board candidate, that potential becomes a reality.

Defendants further argue that I should ignore the potential for political divisiveness notwithstanding *Lemon*, *Roemer*, and *Nyquist*, because in the instant case the programs have existed for some time without such division. In summary, they argue that potential can be ignored when the track is smooth. Such an argument applies only to effect, however, and not to the clear teaching of *Lemon* and its progeny with respect to potential. Indeed, it might be argued that political interference with religion, and its corollary, was the touchstone of the drafters' reasoning in the First Amendment.

Periodic appropriations battles and expanded budgetary demands heighten the threat of political divisiveness resulting from the programs at issue. Therefore, I conclude that both programs create an untenable potential for political division along sectarian lines. While "the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decision of the Court, it is certainly a 'warning signal' not to be ignored." *Committee for Public Education v. Nyquist*, *supra* at 794.

By contrast, forbidden administrative entanglement normally takes the form of excessive government surveil-



lance of religious institutions and personnel. This type of administrative entanglement typically involves the government in policing the expenditures of public monies to insure, as the Establishment Clause requires, that such monies are expended only for secular purposes. An evaluation of administrative entanglement requires me to consider three factors: "(1) the character and purposes of the benefited institutions, (2) the nature of the aid provided, and (3) the resulting relationship between the state and the religious authority." *Roemer v. Maryland Public Works Board*, 426 US at 748.

As to the character and purpose of the benefited institutions, I have previously concluded that the aided schools, both elementary and secondary, are characterized by substantial religious activity having the primary purpose of advancing religious doctrines. Most, if not all, of the nonpublic schools were located on or near parish churches. The great majority of instructors at those schools are members of the religious faith with which the school is affiliated. This is also true for the great majority of students, all of whom are at an impressionable age. I conclude without hesitation that the purpose of these schools is to advance their particular religions.

Having previously discussed at length the nature of the aid provided, the Court now examines resulting relationship between the state and the religious institutions. The Grand Rapids Public Schools utilized a lease to gain access to facilities within the religious schools participating in the Shared Time and Community Education programs. The director of the Shared Time program testified that he contacts the nonpublic schools that participate in the program to determine which classrooms can be leased. Subsequently, the director visits the non-

public school building to confer with the Shared Time instructor as to whether the facilities provided are suitable. Pursuant to this arrangement, during the 1981-82 school year rental payments in excess of \$200,000 were received by participating nonpublic schools.

I have previously addressed the virtual identity of the student body and the teaching staff. The record also discloses that no evidence was offered by Defendants that any of the participating students come from public schools. As a matter of fact, one witness admitted that a public school student would not be permitted to enroll in a Shared Time class even though that program was "public". Though Defendants claim the Shared Time program is available to all students, the record is abundantly clear that only nonpublic school students wearing the cloak of a "public school student" can enroll in it.

Sharp focus on administrative entanglement reveals that there is considerable duplication between the teachers and staff of the Shared Time program and the nonpublic schools at which their services are rendered. The evidence abundantly demonstrates that many teachers who are employed by a nonpublic school are also employed by the Grand Rapids Public Schools in the Community Education program at the same school. In other instances teachers, now working as Shared Time instructors were previously employed by the nonpublic school at the same buildings. Teachers working in the sectarian schools, where religion is an integral part of its very purpose, are bound to the advancement of that purpose. As employees of the Grand Rapids Public Schools, those same teachers must discard any expression of the religious values that are otherwise part of the nonpublic schools' reason for existence. Moreover, they must do this within the same building where the normal curricu-



lum is offered, including religion. In essence, nonpublic school teachers employed on a part-time basis by the Grand Rapids Public Schools are required to reverse roles during different times of the day.

The case of Kenneth Zandee is illustrative of the dilemma. Prior to 1977, Zandee was a full-time physical education teacher at Christian High School. In 1977, he entered the employ of the Grand Rapids Public Schools Shared Time program as a full-time physical education teacher assigned to teach at Christian High School. Zandee, thus, returned to Christian High School, this time as a public school employee paid from tax money, to teach the very same subject to the very same Christian High School students. Clearly, during this transition the Grand Rapids Public School had assumed the function of providing physical education courses to the students at Christian High School. To complicate matters further, Zandee also teaches a course called Body Mechanics in the "zero hour" Community Education program conducted at school. Finally, Zandee is also employed by Christian High School, as basketball coach, in both his and the school's private capacities.

The case of Mr. Zandee demonstrates the interrelationships which have of necessity developed between the government and the nonpublic institutions. Likewise, the case of Zandee, and others similarly situated, portrays the real need for monitoring to insure that religious views are not advanced in Shared Time or Community Education programs. Without such monitoring the programs run the risk of enhancing religious views. If the courses are monitored, the programs are still infirm in that an excessive administrative entanglement is necessitated. In either case, the same ultimate result applies and the programs cannot be sustained.

The Court's finding that the programs breed an excessive administrative entanglement is bolstered by the procedures through which classes and schedules are coordinated for the programs. In order to coordinate the scheduling of 1,500 classes offered by 470 teachers, the Grand Rapids Public Schools take the following steps: Shared Time and Community Education course packets are sent to the participating nonpublic schools. In turn, nonpublic schools reply, indicating which classes they wish to offer. The Director of the Shared Time program then contacts the nonpublic schools to determine which classrooms are available. He then confers with the Shared Time teachers to see if the rooms provided are satisfactory. Additionally, because the academic year calendars of the involved schools is not necessarily coterminous, certain adjustments must be made. One reason the calendars are different relates to religious holidays which the nonpublic schools celebrate. Adjusting schedules creates obvious additional administrative entanglement. Upon closer scrutiny the need to intrude becomes greater as does the assault on the First Amendment. Once entanglement becomes necessary, like a runaway horse, it is hard to corral.

Once the class schedules are set, still more forms of entanglement arise. For example, parents wishing to speak with a Shared Time instructor are encouraged to make an appointment through the nonpublic school's administrative office. It is noteworthy that a great number of the schools publish handbooks which commingle Shared Time and Community Education classes and instructors with those offered exclusively by the nonpublic school. No mention is made of the fact that these teachers are public school employees and the classes are public offerings. Instead, the impression is conveyed that the teachers listed are nonpublic school teachers. Likewise, the

courses listed convey the impression that they are offerings of the particular nonpublic school. Additional entanglement problems arise with respect to student discipline, attendance and dress code policies.

The trial record reveals that, indeed, there has been intermingling of public and nonpublic personnel, courses and other materials. It is not unusual for the supervisor of one of the challenged programs to be a teacher, or even the principal, at one of the participating religious schools. Indeed, teachers now on the public school payroll occupy similar positions as before the inception of the programs, with minimal changes in the identity of students or responsibilities. The Public School District is gradually, but surely, taking over an integral function of these religious schools; namely, providing an education to parochial students. As they are currently implemented, it is not difficult to see that both programs are destined to continue expanding numerically, geographically and, most significantly, in terms of the attendant administrative entanglement. For the above reasons, I am compelled to hold that both the Shared Time and the Community Education programs at issue are constitutionally infirm on the basis that they create an excessive administrative entanglement between government and religion.

### DECISION

Detailed consideration of the trial record, of the findings and conclusions of the District Judge, and of the applicable Supreme Court case law generated by the First Amendment clause prohibiting any law "respecting an establishment of religion" convinces this court that the judgment of the District Court must be affirmed.

We accept, as did the District Judge, the facts upon which the appellants chiefly rely. There is no doubt that all of the parochial schools concerned (except the Lutheran School) accept applicants for admission from families of other religious persuasions and admit some such students. There is no proof that any teacher in either Shared Time or Community Development classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion.

Nonetheless, several conclusions flow from the record, and findings of the District Court:

First, the schools with whom the School Board of Grand Rapids has contracted and in which these classes are taught are religious institutions created, controlled and operated (as, of course, they have a clear right to be) with the advancement of their various religious faiths as a primary purpose.

Second, the majority of the controlling boards, administrators and teachers in the schools are adherents to the particular school's religious mission, as are the great majority of the parents of the students and the students themselves.

Third, the program has increased to the point where it involves 10% of the classroom time of the schools concerned and a total tax expenditure of \$6,000,000.

Fourth, a substantial number of the teachers employed in the Shared Time program were previously employed in the parochial school concerned, and a majority of teachers employed in the Community Education classes are teachers regularly employed in teaching in the religiously oriented program of the schools concerned.

Fifth, such supplementation of teachers' salaries is a direct benefit to all teachers in the two programs, and through them



to the schools and to the religious mission of the schools concerned.

Sixth, the District Judge found, and we agree, that as to the three school systems concerned, "a substantial portion of the participating nonpublic schools' functions are subsumed in the religious mission . . ." *Hunt v. McNair*, 413 U.S. 734, 743 (1973). This last finding is amply substantiated by the following materials which describe the religious nature of the programs with which we deal in this case. As to the Catholic schools, the Superintendent of Schools for the Roman Catholic Diocese of Grand Rapids stated by affidavit in this record, "It is the policy of the Grand Rapids Catholic schools ordinarily to require students to attend religious instruction classes and religious services either at the Catholic school or at the church of his own faith if the student is not Catholic." The St. Jude School Parent Handbook describes the philosophy of Catholic education as "A God oriented environment which permeates the total educational program." As to the Christian schools, the District Judge found that membership in the Grand Rapids Christian School Association, which operates the schools, is restricted to those who subscribe to a doctrinal Basis, which provides in part: "the Word of God must be an all-pervading force in the educational program." (See the full statement of Basis, *supra*, page 10.) As to the Lutheran school involved in the Shared Time and Community Development Program, the School Handbook says in part: "The child is instructed in all the common school branches of learning, as prescribed by the state. But all such instruction is given from a Christian point of view. The child is thus protected from the dangers of a purely secular schooling."

The District Judge stated his conclusion in this case as follows:

The trial record reveals that, indeed, there has been intermingling of public and nonpublic personnel, courses

and other materials. It is not unusual for the supervisor of one of the challenged programs to be a teacher, or even the principal, at one of the participating religious schools. Indeed, teachers now on the public school payroll occupy similar positions as before the inception of the programs, with minimal changes in the identity of students or responsibilities. The Public School District is gradually, but surely, taking over an integral function of these religious schools; namely, providing an education to parochial students. As they are currently implemented, it is not difficult to see that both programs are destined to continue expanding numerically, geographically and, most significantly, in terms of the attendant administrative entanglement. For the above reasons, I am compelled to hold that both the Shared Time and the Community Education programs at issue are constitutionally infirm on the basis that they create an excessive administrative entanglement between government and religion.

The Shared Time and Community Education programs established and implemented by the School District for the City of Grand Rapids, through the use of premises leased from various religious schools, violate the Establishment Clause of the United States Constitution because the programs have the primary effect of advancing religion, and because the programs involve an excessive government entanglement with religion. Plaintiffs are entitled to a Permanent injunction barring further implementation of the programs at issue and the expenditure of public tax monies.

Our review of Supreme Court First Amendment case law convinces us that we must affirm Judge Enslen's conclusion in this case as stated immediately above. The cases upon which we rely primarily for our conclusions are the following: *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421



U.S. 349 (1975); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McCollum v. Bd. of Education*, 333 U.S. 203 (1948).

The significant features which distinguish this present case from cases wherein the Supreme Court has *not* found violation of the establishment clause are these: First, this program is primarily a program of assistance to elementary schools;<sup>[1]</sup> second, this program is one which gives substantial financial aid to education in parochial school buildings;<sup>[2]</sup> third, the parochial schools concerned have religious indoctrination as a primary school purpose;<sup>[3]</sup> fourth, the impact upon taxpayers and the parochial schools is direct.<sup>[4]</sup>

We recognize that the Supreme Court has recently divided 5-4 in upholding a Minnesota tax statute which allowed taxpayers to deduct certain expenses paid by them as parents in connection with their children's attendance in either public or private schools. These expenses included deductions generally beneficial to parents of all school children such as books, supplies and transportation. The statute also allowed deduction up to \$500 or \$700 of tuition paid to private, including parochial, schools. This was, of course, a deduction not gen-

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*Cf. Hunt v. McNair*, 413 U.S. 734, 741 (1973).

[2]

*Cf. Mueller & Noyes v. Allen*, 51 U.S.L.W. 5050 (U.S. June 29, 1983); *Wolman v. Walter*, 333 U.S. 229, 246-7 (1977); *Hunt v. McNair*, 413 U.S. 734, 743-44 (1973); *Zorach v. Clauson*, 343 U.S. 306, 308-9 (1952); *Everson v. Bd. of Education*, 330 U.S. 1, 17 (1947).

[3]

*Roemer v. Maryland Public Works Bd.*, 420 U.S. 736, 755-59 (1976); *Cf. Hunt v. McNair*, 413 U.S. 734, 743-44 (1973).

[4]

*Cf. Mueller & Noyes v. Allen*, 51 U.S.L.W. 5050, 5053 (U.S. June 29, 1983); *Hunt v. McNair*, 423 U.S. 734, 745 n.7 (1973).

erally available to parents of children in public schools — a fact which led four Justices to dissent on the grounds that the tuition deduction “has a primary effect of promoting religion.” The majority in upholding the Minnesota statute relied principally upon the fact that the statute made some deductions (for books, school supplies, transportation, etc.) generally available to parents of all school children. Justice Rehnquist, writing for the majority, also distinguished earlier Supreme Court decisions on the grounds that in the Minnesota tax case the aid was given to the parents of the children involved and not to the parochial schools themselves. The majority opinion said:

We also agree with the Court of Appeals that, by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children. For these reasons, we recognized in *Nyquist* that the means by which state assistance flows to private schools is of some importance: we said that “the fact that aid is disbursed to parents rather than to — schools” is a material consideration in Establishment Clause analysis, albeit “only one among many to be considered.” *Nyquist*, at 781. It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves. The exception, of course, was *Nyquist*, which, as discussed previously is distinguishable from this case on other grounds. Where, as here, aid to parochial

schools is available only as a result of decisions of individual parents no "imprimatur of State approval," *Widmar*, at — —, can be deemed to have been conferred on any particular religion, or on religion generally.

51 U.S.L.W. 5053 (U.S. June 29, 1983).

The Shared Time and Community Development programs at issue in this case clearly give direct aid to parochial schools in parochial school buildings. By so doing, they also assist those schools in performing their religious missions, in violation of the First Amendment.

We recognize, of course, the increasing impact of Supreme Court majority approval of public funding for religiously neutral supplies and services which are provided to all schools, including parochial schools. If, however, what has been adopted by the Grand Rapids School Board were to be added to the list of such approvals, the separation of church and state will be effectively ended in the field of public education. Legislatures in many states are notoriously vulnerable to pressures from religious constituencies. Under such pressures legislatures can be expected to allocate increasing Shared Time or Community Development funds to the point where the great majority of parochial school costs will be carried by taxpayers. The only costs not covered may in time be those specifically allocated to religious services or classes in religious instruction. Constant secular inspection and surveillance of all activities not specifically labeled religious would be required to maintain even a fiction of separation. Such a result would end public education as a major aspect of the American goal of equality of opportunity.

### THE DISSENT

The dissent in this case cites a number of cases which illustrate that the Supreme Court of the United States has approved as not violative of the First Amendment's establishment clause many instances of tax-supported activities which in addition to serving nonsectarian public purposes, also render assistance to parochial school children. It cites no instance (because there is none) where the Supreme Court has approved expending public tax funds for teachers to teach in parochial schools.

In this regard, however, it also cites *Wheeler v. Barrera*, 417 U.S. 402, 94 S.Ct. 2274, 41 L.Ed.2d 159 (1974), seemingly as support for its position. The *Wheeler* case, however, is not authority for the position taken by the dissent. As Justice Powell put the matter in his concurrence with the majority:

MR. JUSTICE POWELL, concurring.

The Court holds that under Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 241a *et seq.*, federal courts may not ignore state-law prohibitions against the use of publicly employed teachers in private schools, *ante*, at 416-417, that Title I does not mandate on-the-premises instruction in private schools, *ante*, at 419, and that Title I does not require that the services to be provided in private schools be identical in all respects to those offered in public schools. *Ante*, at 420-421. It is thus unnecessary to decide whether the assignment of publicly employed teachers to provide instruction in sectarian schools would contravene the Establishment Clause of the First Amendment. *Ante*, at 415. On that basis, I join the Court's opinion. I would have serious misgivings about the constitutionality of a



statute that required the utilization of public school teachers in sectarian schools. See *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

*Id.* at 428.

Similarly, the dissent seeks to make some association between the 60 years of operation of the Community Education program in the Grand Rapids public schools and the placement of teachers on the public payrolls in the three parochial systems involved in this litigation. The preceding Community Education program is not involved at all in this litigation — except as an example of how public funds may *appropriately* be used to teach parochial school children in public school classes in *public schools*.

This record clearly shows that the parochial school child who takes a publicly tax-supported class from a regular parochial school teacher who is on the public payroll for that class is likely to be taught by a teacher who is a member of the religious faith which operates the parochial school. As such he or she is charged with carrying out the religious mission of the church concerned. That teacher, without any breach of faith by either the religious denomination or the public schools, by his or her effective teaching in the Shared Time or Community Education class may so impress the student as to become a role model. That same teacher in the corridors outside that classroom door — in the lunchroom, on the playground, in the auditorium, or in another class when on the parochial school payroll — has an obligation to carry out his or her assigned role of religious education and indoctrination of this same student. Under these circumstances, the task of separating church and state becomes literally impossible, and the program has the primary effect of advancing religion.

Where for six years 470 teachers on tax-supported payrolls have been teaching 11,000 children in 41 private schools without significant monitoring, the relationships between those teachers and those students are bound to have had an effect in carrying out the parochial school teacher's duty to advance religion.

We should also point out that while the three churches involved at this time in this program have reputations for social responsibility, this same sort of program, if legitimized by ultimate legal authority and spread nationwide, will face applications for similar assistance by dozens if not hundreds of religious organizations. Many less orthodox religious sects would be equally entitled to public funds from these programs, assuming they meet state law standards. Many of them may also act as a result of religious zeal and economic need with much less responsibility than the District Judge and this court have assumed was true concerning these defendants. Extensive monitoring would be required to maintain even a surface appearance of separation of church and state.

Still another aspect of the basic *Lemon v. Kurtzman* tests is *Lemons'* emphasis upon political divisiveness:

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and



employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

*Id.* at 622.

As the Supreme Court notes immediately below, "political division along religious lines shows one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman*, *supra* at 622. Such political divisiveness has already been exemplified in a statewide voter referendum and extensive litigation. See illustrative citations on page two of this opinion; particularly *Traverse City School District v. Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971). Additionally, the District Judge has pointed to the fact that these programs were very much a part of a recent school board's campaign for increased millage and might well be again in 1983.

In the background of this litigation is a classic political battle over this same program referred to in the newspapers of 1971 as "parochiad." The issue was presented by a petition for a constitutional amendment, obviously intended to bar parochiad. Although the amendment was adopted, it was found invalid under the state constitution by the Michigan Supreme Court. See the dramatic story of this classic example of religious divisiveness as set forth in the *Traverse City School* case, *supra*, fn. 2.

The judgment of this District Court is affirmed.

KRUPANSKY, Circuit Judge, dissenting.

## I. ESTABLISHMENT OF RELIGION

Since the majority opinion conspicuously ignores the successful and fully documented operational history of the challenged Shared Time and Community Education programs, and relies upon speculation, conjecture and factually disproved hypotheses, I must respectfully dissent. The salient facts are undisputed and uncomplicated. Grand Rapids, through legislative authorization, has during the six years preceding this action implemented Shared Time and Community Education programs whereby public school instructors teach supplemental secular courses at physical facilities owned by non-public schools in "public classrooms". These courses have been offered to non-public students at public facilities for over 60 years. The exhaustive record compiled in this case is compelling for what it has failed to develop. Although the two programs are offered at over 41 private schools, and involve as many as 470 full and part-time instructors and 11,000 students on an annual basis, no evidence of record supports the proposition that any teacher, even on a single instance either directly or indirectly, used or attempted to use the secular instructional period as a vehicle for sectarian indoctrination. The majority concedes, as it must, that "[t]here is no proof that any teacher in either Shared Time or Community Development classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion." (Maj op., *supra*, — F.2d at —) Although absolutely no evidence of indoctrination or attempted indoctrination exists, in spite of incalculable encounters between pupils and instructors during the six years of the programs' operation, the majority concludes that conducting the courses on premises owned by non-public schools is, in and of itself *per se*, advancing religion in violation of the First Amendment to the Constitution. This record dem-

onstrates unequivocally, however, that the Shared Time and Community Education programs have remained in practice constitutionally neutral.

The documented operational history of the challenged Shared Time and Community Education programs places this action in a unique constitutional posture. Although the majority has elected to ignore the flawless operation of the challenged programs, it is a fundamental canon of jurisprudence that adjudications must be predicated upon the record before the court. This elementary principle is fully applicable to challenges to state action as violative of the establishment clause. For example, the Supreme Court has refused to address the constitutionality of a program authorized by statute until such time as the program had been implemented and an operational record was available for consultation:

The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 603, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). It would be wholly inappropriate for use to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts, and the Court of Appeals was correct in so concluding.

*Wheeler v. Barrera*, 417 U.S. 402, 426, 94 S.Ct. 2274, 2288, 41 L.Ed.2d 159 (1974). See also: *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F.Supp. 1448 (S.D. N.Y. 1980).

As an inescapable corollary to *Wheeler*, the federal court which is reviewing an establishment clause challenge to an existing program must examine the program's operation and practice to ascertain whether it is constitutionally offensive. See also: *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975) (record consulted to ascertain nature of the benefited institutions, percentage of schools sectarian oriented, and amount of monies appropriated); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971) (extensive record); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 96 S. Ct. 2337, 49 L.Ed.2d 179 (1976) (lengthy record compiled during several weeks of trial primarily documenting the nature of the benefited institutions and the manner in which the challenged program was implemented); *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977) (record supplied through parties' stipulations as to the manner in which a statutorily authorized program would be implemented); *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923 (1968) (statute authorizing loan of secular texts to non-public students held constitutional in the absence of record establishing that texts were utilized as a vehicle for inculcation); *Hunt v. McNair*, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (statute authorizing revenue bonds to assist institutions for higher education held constitutional in the absence of evidence that monies would be used to advance religious ideologies). Accordingly, it is incumbent upon this court to scrupulously confine its establishment clause analysis to the particular factual contours before it.

The tripartite test for identifying an impermissible state establishment of religion was pronounced in *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S.Ct. 2105, 2111 (1971):



First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed. 2d 1060 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Waltz, supra*, at 674, 90 S. Ct. at 1414.

See also: *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 745, 773, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948 (1973); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 748, 96 S.Ct. 2337, 2345, 49 L.Ed.2d 179 (1976); *Wolman v. Walter*, 433 U.S. 229, 236, 97 S.Ct. 2593, 2599, 53 L.Ed.2d 714 (1977); *Larkin v. Grendel's Den, Inc.*, — U.S. —, —, 103 S.Ct. 505, 510 (1983); *Mueller v. Allen*, — U.S. —, —, 51 U.S.L.W. 5050, 5052 (June 29, 1983).

#### A. SECULAR PURPOSE

The district court determined, and the majority concedes, that the challenged programs are attended by a secular purpose and that the first criterion of *Lemon* has been satisfied.

#### B. PRIMARY EFFECT

Confronting the inquiry of whether the Shared Time and Community Education programs have an impermissible primary effect of advancing religion, it is initially observed that the schools involved are sufficiently sectarian so as to invoke establishment clause analysis. The record reflects, and the majority observes, that a substantial portion of the functions of the institutions concerned are subsumed in the religious mission. The majority's finding of impermissible advancement of religion appears to be divisible into three categories: (1) recipients of the program are designated on

a basis of religion; (2) the program directly benefits not only the school students but also the non-public institutions by conferring substantial financial benefits to the non-public schools and by maintaining an environment of religious autonomy; and (3) risk that religious doctrines would be advanced by instructors.

The majority predicates its conclusion that the programs at issue advanced religion upon the observation that "[t]he challenged programs impact upon a very narrow religious class of beneficiaries." (Maj. op., *supra*, — F.2d at —). This statement is in direct contradiction to the majority's factual finding that "all Community Education programs are otherwise available at the public schools, usually as a part of their more extensive regular curriculum." (Maj. op., *supra*, — F.2d at —). Simply, Grand Rapids has provided Community Education programs to both public and non-public school students. Although the only Community Education programs which are *challenged* in this action are those conducted on the premises of non-public schools, it is obvious that recipients of Community Education programs are not limited to pupils of the sectarian institutions. In this respect the Community Education programs are similar to the constitutionally permissible tax deductions, for tuition, textbooks and transportation available to parents with dependents attending public *and* private schools. *Mueller v. Allen*, 51 U.S.L.W. 5050 (June 29, 1983). It is further similar to the constitutionally firm statute authorizing free loans of textbooks to students attending both private and public schools approved in *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923 (1968). The majority's reliance upon *Nyquist, supra*, is therefore misplaced. In that case the constitutionally infirm statutes established three financial aid programs available *only* to non-public elementary and secondary schools. Simply, in the case at bar, the class of beneficiaries, unlike that in *Nyquist*, is not so limited.



The majority further predicates a finding of advancement of religion upon the premise that the challenged programs conferred a financial benefit upon the non-public schools by relieving their fiscal responsibilities:

Another glaring nonsecular effect of the programs is that financial *responsibility* for teaching Physical Education, Art, Music and all of the other available course offerings has been transferred from the private religious schools to the taxpayers.

(Maj. op., *supra*, — F.2d at —) (emphasis added). The non-public schools, however, were never charged with a responsibility for offering the challenged courses. As the majority concedes,

The specific courses available through the elementary level Shared Time programs would not otherwise be available in any of the nonpublic schools, and are *not required for graduation* or progression to the next grade.

(Maj. op., *supra*, — F.2d —).<sup>[2]</sup> All Shared Time programs, therefore, are supplemental to the statutorily required core curriculum which must be offered by the non-public schools as a condition of state accreditation. Similarly, all Community Education courses are supplemental. It follows logi-

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The majority herein, citing the district court opinion, continues as follows:

The participating private secondary schools, however, require for graduation a course in physical education. Such courses are offered at those schools only on a Shared Time basis."

This statement is misleading since appellants have not appealed from the district court's judgment to the extent that it prohibits physical education and industrial arts Shared Time classes at the secondary level.

cally that the non-public schools have not been relieved of a fiscal responsibility since they were never charged with a statutory duty to offer the supplemental courses at issue.

At best, the Community Education and Shared Time programs permit the non-public schools to offer an expanded supplemental curriculum at the facilities in issue. There is no evidence of record, however, that this expanded curriculum has resulted in an increase in the enrollment of the participating institutions. In fact, the percentage of school age children in Grand Rapids attending non-public schools has remained within 1 percentage point of 30% from 1971 (5 years prior to implementation of the Shared Time and Community Education programs in 1976) to 1981. The district court entered no finding nor is there support in the record that the non-public schools involved were economically distressed or that the challenged programs provided a economic lifeline to sectarian institutions. Rather, the record discloses that said institutions enjoyed and continue to enjoy economic self-sufficiency. In sum, there is no evidence that the sectarian institutions were relieved of fiscal responsibilities or depended upon the challenged programs for economic survival.

The majority also predicates a finding of advancement of religion upon the premise that the challenged programs benefited the schools, as institutions, by enabling them to offer supplemental secular courses while simultaneously avoiding student exposure to non-religious environments. Conspicuously absent from the majority opinion is any reference to Supreme Court precedent in support of the proposition that the maintenance of religious autonomy of the sectarian institutions involved may serve as a criterion for identifying an impermissible advancement of religion. Nor does such a novel legal proposition reflect the spirit of the Court's establishment clause cases. In *Wheeler v. Barrera*, 417 U.S. 402, 94 S.Ct. 2274, 41 L.Ed.2d

159 (1974) the Court refused to hold unconstitutional a federal statute which authorized federal monies for public schools and "comparable" programs in non-public schools. An obvious by-product of the *Wheeler* statute would be preservation of religious autonomy of sectarian schools receiving grants for "comparable" programs. Similarly, in *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977) the state's constitutionally permissible provision of texts, standardized testing and scoring and diagnostic services at the sectarian schools served, ultimately, to promote religious autonomy. The preservation of a religious environment generated by the Shared Time and Community Education programs at issue is, at best, an "incidental" benefit to the non-public schools. Reflecting decades of precedent, the Supreme Court has recently reaffirmed the proposition that incidental benefits do not offend the first amendment:

One fixed principle in this field is our consistent rejection of the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause.

*Mueller v. Allen*, — U.S. —, 51 U.S.L.W. 5050, 5051 (1983). Accord: *Lemon*, *supra*, 91 S.Ct. at 2112; *Nyquist*, *supra*, 93 S.Ct. at 2965; *Meek*, *supra*, 95 S.Ct. at 1763; *Roemer*, *supra*, 96 S.Ct. at 2345.

Last, the majority predicates a finding of advancement of religion upon the programs' inherent potential to be utilized as a vehicle for indoctrination of religious ideologies:

Without questioning the good faith and integrity of the teachers, this Court cannot ignore the potential for advancing religious doctrine under these conditions. Notwithstanding these concerns, a larger problem lies in the fact that challenged courses are conducted in the sec-

tarian atmosphere of the religious schools. As specifically addressed in *Nyquist*, there is a deeper concern that the atmosphere of the schools, rather than the actions of the instructors, will have an effect which advances religion.<sup>[3]</sup>

(Maj. op., *supra* — F.2d at —. Given the detailed and documented successful operational history of the Shared Time and Community Education programs, the majority's reliance upon an abstract "potential for advancing religious doctrine[s]" is totally inapposite. No evidence of record supports a finding that any teacher ever advanced religious views during the 6-year period at issue. Rather, the record is replete with myriad affidavits and testimony of program instructors attesting to the contrary. The evidence of record, in its entirety, supports the conclusion that all instructors scrupulously confined their instruction to the secular.

The district court, and the majority, err as a matter of law by interjecting hypothesis into the constitutional "primary effect" inquiry and by ignoring the documented historical display of neutralism which attended the programs' operations. At least one court has sought to defer to documentary evidence when such exists:

The Court will not conjure up hypothetical situations in the face of a fourteen year record. See *Wheeler v. Barrera*, *supra*, 417 U.S. at 426-27, 94 S.Ct. at 2287-88. On the basis of all the evidence presented, the Court concludes that the risk of religious advancement has not been realized and New York City's Title I program does not have an unconstitutional primary effect.

[3]

The majority concedes that the space occupied and used for implementation of the Shared Time Community Education programs have at all times here in issue been completely desanctified and totally devoid of any religious icons or symbols.



*National Coalition for Public Education and Religious Liberty v. Harris*, 489 F.Supp. 1448, 1265 (S.D. N.Y. 1980), *app. disp.*, 101 S.Ct. 55 (1980), *reh. den.*, 101 S. Ct. 601 (1980). The risk or danger that an instructor may potentially advance religious views is more properly directed to the issue of whether such instructors require monitoring to insure that no religious views are advanced, which in turn joins the issue as to whether such monitoring would generate impermissible entanglement of church and state. However, when confronted with the second *Lemon* inquiry, namely, whether the challenged program has the *primary effect* of advancing religion, the record may not be abdicated in favor of hypothetical speculation. There is no proof that any teacher advanced religious ideologies during the secular activities. All proof is to the contrary. Therefore, the second prong of *Lemon* has been satisfied.

The Shared Time and Community Education programs are prime examples of the "student benefit programs" which have been repeatedly countenanced by the Supreme Court as constitutionally inoffensive. See: *Everson v. Board of Education*, *supra*; *Board of Education v. Allen*, *supra*; *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Mueller v. Allen*, *supra*. The students' exposure to supplemental secular instruction renders the pupils, rather than the institutions, the principal beneficiaries of the challenged programs. The Court's decisions in *Allen*, *Meek* and *Wolman* clearly teach that the state may provide secular written texts to pupils attending sectarian schools without violating the establishment clause. A logical corollary to these cases is the principle that the state may provide oral secular instruction so long as such instruction is, *in fact and practice*, confined to secular ideologies and does not have the primary effect of advancing religion. In the action *sub judice* the students have received secular instruction which is no more constitutionally offensive than the "instruction" which appears in the published forms of textbooks.

### C. ENTANGLEMENT

State action which fosters "an excessive government entanglement with religion" violates the establishment clause. *Lemon*, *supra*, 403 U.S. at 613, 91 S.Ct. at 2111 (emphasis added). This test, by its own terms, instructs that *some* entanglement between church and state is constitutionally permissible. See: *Hun v. McNair*, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (state inspection of private facilities to insure that revenue bond funds were utilized for secular projects did not excessively entangle church and state); *Van Mueller v. Allan*, *supra* (state's inspection of tax return to assure that deductions were not taken for religious textbooks not "excessive"). The administrative relationship which exists between the church and state in the implementation and logistic scheduling process of the Shared Time and Community education programs is minimal.

The majority predicates a finding of impermissible entanglement upon the theory that the Shared Time and Community Education programs created a potential for the advancement of religious ideologies generating a need to monitor the instructors to insure neutrality. However, since the record unequivocally discloses the complete absence of any religious indoctrination or attempted religious indoctrination during the protracted implementation of the programs at issue irrespective of any monitoring by the state, the majority's position is equivalent to a *per se* rule against secular instruction at sectarian owned facilities because of a factually disapproved speculation that a need to monitor this relationship will, without exception, constitute excessive entanglement. Such a *per se* rule is totally incongruent with the flexible nature of the establishment clause. The "entanglement" test initially pronounced in *Lemon*, *supra*, presupposes the existence of a potential for the advancement of religious ideologies. It has



typically been utilized where there is no record as to the presence or absence of religious advancement during the course of the challenged program's administration; in such instances the court simply identifies the entanglement which would be necessary to assure that the potential for advancement is not realized. See, e.g., *Nyquist, supra*.

The "primary effect" and "entanglement" criteria of *Lemon* are therefore related inquiries. Logic dictates that as the "potential" for advancement of religion decreases the need to monitor correspondingly decreases. It is axiomatic that the state's need to monitor will decrease when the *likelihood* that religion will indeed be advanced is highly improbable.

In the action *sub judice* no instructor during the 6-year period at issue has ever utilized or attempted to utilize the Shared Time and Community Education programs as a vehicle for religious indoctrination. There is no reason to believe that continued implementation of these challenged programs will deviate from this firmly established practice in the future. At this point in the history of the programs' operations, and in light of the exhaustive record, it is beyond peradventure that there never was a necessity to monitor the program in the past and accordingly every reason to believe that the need will not arise in the future. Without such monitoring or need to monitor, no "entanglement" manifests. The foregoing rationale applies with equal force to the issue of "political entanglement". There is no evidence of record to support the proposition that any political divisiveness has resulted in response to the Shared Time and Community Education programs.

In the event that any instructor in the future transgresses the constitutional boundaries of neutralism and advances religious ideologies, the federal forum is forever available to timely foreclose such activity. However, upon the flawless

record before this Court, it simply cannot be concluded that the Shared Time and Community Education programs are unconstitutional.

## II. STANDING

Further, the individual plaintiffs lack standing to initiate this action and it should be dismissed for lack of Article III jurisdiction. In 1968 the Supreme Court issued *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), wherein it distinguished its earlier pronouncements in *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed 1078 (1923), and conferred standing upon taxpayers to invoke federal jurisdiction upon satisfying certain defined criteria. In *Flast*, it was observed that Congress had enacted the Elementary and Secondary Education Act of 1965 (Act) pursuant to the authority of Article I, Sec. 8, United States Constitution, which authorizes Congress to appropriate and expense allocated sums for the general welfare. The Act authorized appropriations of federal funds to state educational agencies for distribution to local educational institutions which had submitted education programs designed to aid low income families. Before a local educational agency could receive such funding, however, it was required to submit a "plan" to the state educational agency satisfying various criteria promulgated by the United States Commissioner of Education, the individual responsible for implementation of the act. One salient criterion necessitated the plan to equally benefit low income students attending both public and *private* institutions. As a result, federal funds were channeled to provide instructors and textbooks in religious schools. A taxpayers' action was initiated seeking (1) a declaration that either the Act did not approve expenditures to religious schools or, if so, the Act was unconstitutional to the extent as violative of the establishment clause and (2) an injunction prohibiting such expenditures.

*Flast* established a two-pronged test, as noted by the district court, for taxpayer standing:

Thus, our point of reference in this case is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program. Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus v. Board of Education*, 342 U.S. 429, 72 S. Ct. 394, 96 L.Ed. 475 (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

*Id.*, 392 U.S. at 102-03, 88 S.Ct. at 1953-54.

*Flast* expressly adjudged that the establishment clause constituted a specific limit on the taxing and spending power:

We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases.

*Id.*, 392 U.S. at 105, 88 S.Ct. at 1955.

Accordingly, *Flast* acknowledged taxpayer standing to the extent that it permitted the taxpayer to challenge the constitutionality of an exercise of congressional power emanating from the taxing and spending clause of Art. I, § 8 of the United States Constitution. This criteria was satisfied in *Flast* since the taxpayer sought a declaration that the Elementary and Secondary Education Act of 1965 was unconstitutional in that it authorizes various expenditures to religious schools. Simply, the *Flast* taxpayer directly challenged the constitutionality of a congressional enactment. The *Flast* taxpayer would not have enjoyed standing had the complaint alleged only "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Flast, supra*, 392 U.S. at 102, S.Ct. at 1953.

In its most recent taxpayer standing decision the Supreme Court reaffirmed the *Flast* requirement that the challenge issue to a congressional action. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, — U.S. —, 102 S.Ct. 752 (1982). Therein it was observed that Article IV, § 3, Cl. 2 of the United States Constitution (property clause) vests Congress with the power to dispose of property owned by the United States. Consistent with this



delegation of power, Congress enacted the Federal Property and Administrative Services Act of 1949. Said Act authorized the Secretary of HEW to dispose of surplus real property "for school, classroom, or other educational use." The Secretary of HEW promulgated a regulation providing that the price of surplus property sold for a "public benefit" would be discounted to the extent that the United States shared in the benefits of the new use. In accordance with the foregoing authorization, the Secretary conveyed a 77 acre tract of land which had been declared "surplus property" to the Valley Forge Christian College. The entire appraised value of the property at the time of conveyance, \$577,500, was discounted and Valley Forge acquired the property without financial payment. The deed from HEW required Valley Forge to use the property for 30 years for educational purposes consistent with Valley Forge's application. By its own description, Valley Forge's purpose was to offer collegiate level training to men and women for Christian service as either ministers or laymen. Subsequent to the conveyance, Americans United for Separation of Church and State (Americans United) initiated an action seeking (1) a declaration that the conveyance was void as violative of the Establishment Clause and (2) an order compelling Valley Forge to transfer the tract back to the United States. The Supreme Court adjudged that Americans United, and the individual members thereof, lacked standing as taxpayers to initiate the cause of action because: (1) the complaint did not challenge legislative action, but rather an executive decision by HEW, and (2) the legislative act upon which the HEW decision was predicated emanated from the property clause of the United States Constitution rather than from the taxing and spending clause (Art. I, § 8):

Unlike the plaintiffs in *Flast*, respondents fail the first prong of the test for taxpayer standing. Their claim is deficient in two respects. First, the source of their com-

plaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property. *Flast* limited taxpayer standing to challenges directed "only [at] exercises of congressional power." *Id.* at 102, 88 S.Ct., at 1954. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 228, 94 S.Ct. 2925, 2935, 41 L.Ed. 2d 706 (1974) (denying standing because the taxpayer plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch").

Second, and perhaps redundantly, the property transfer about which respondents complain was not an exercise of authority conferred by the taxing and spending clause of Art. I, § 8. The authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2. Respondents do not dispute this conclusion, see Brief for Respondents 10, and it is decisive of any claim of taxpayer standing under the *Flast* precedent.

102 S.Ct. at 762-63 (footnotes omitted).

Collectively, *Flast* and *Valley Forge* make clear that taxpayer standing demands a challenge to the constitutionality of a *congressional* action, i.e., a legislative enactment. The *Flast* taxpayer challenged the constitutionality of the Elementary and Secondary Education Act of 1965. The *Valley Forge* taxpayers lacked standing because they did not contest the constitutionality of the underlying statute, but rather challenged an administrative decision rendered to implement the statute: "the source of their complaint [was] not a *congressional* action." 102 S.Ct. at 762.

*Valley Forge* firmly established that a federal taxpayer will possess standing as a taxpayer only where the challenged spending or fiscal appropriations derive from a legislative



enactment promulgated in accordance with the taxing and spending clause of Art. I, § 8. By analogy, a state taxpayer, as in the case at bar, must challenge appropriations derived from the state's constitutional equivalent to Art. I, § 8 of the United States Constitution. The Michigan Constitution vests in the Michigan Legislature the power to appropriate public funds. The Michigan Legislature has enacted provisions whereby funds derived from liquor excise taxes are channelled to school aid funds, MCLA § 388.1620, and general funds may be channelled to school aid funds, MCLA § 388.1611, when other funds are insufficient to meet fiscal demand. The Michigan Legislature has also enacted the State School Aid Act of 1979, MCLA § 388.1601 *et seq.*, which authorizes payment of state school aid funds to local boards of education for part time students receiving shared time instructions. Defendants, pursuant to this statute, and Administrative Rules §§ 340.6 and 340.7, promulgated by the Michigan Department of Education, have authorized payment of school aid funds to local boards of education.

Had plaintiffs challenged the constitutionality of these Michigan legislative enactments, they may possibly have invoked taxpayer standing under the criteria of *Flast* and *Valley Forge*. Plaintiffs, however, have not challenged the constitutionality of any statutory provision. Rather, the complaint, at best, avers a vague nexus between the Shared Time and Community Education programs and the status of plaintiffs as taxpayers:

5. Each of the individual plaintiffs is a citizen of the United States and a resident within said school district and pays income taxes and other taxes to the United States, and to the State of Michigan and the said school district, and each is a qualified, legal voter registered in the city of Grand Rapids, Kent County, Michigan.

• • •

WHEREFORE, plaintiffs pray:

- (1) For a Judgment declaring the leasing and "shared time" arrangement between School District and the various nonpublic schools, and the payment of state aid funds to School District, to be violative of the Establishment Clause of the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth, and therefore illegal and null and void.

The pleading of such a vague nexus between the challenged programs and plaintiffs' status as taxpayers is insufficient under *Flast* and *Valley Forge* to invoke taxpayer standing. The instant taxpayers, as those in *Valley Forge*, have simply challenged executive decisions rather than exercises of congressional power. The complaint, as framed, fails to invoke Article III jurisdiction and the cause of action should have been dismissed for this reason.

UNITED STATES COURT OF APPEALS  
SIXTH CIRCUIT  
U.S. POST OFFICE & COURTHOUSE BUILDING  
CINCINNATI, OHIO 45202

JOHN P. HEHMAN  
CLERK

TELEPHONE (513) 684-2953 — FTS 684-2953

September 23, 1983

Mr. John R. Oostema  
Mr. Albert R. Dilley  
Mr. Gerald F. Young  
Mr. Stuart D. Hubbel

RE: Case Nos. 82-1600/1601/1602

Americans United for Separation of Church and  
State, et al., Plaintiffs-Appellees,  
v. The School District of the City of Grand  
Rapids, Defendant-Appellant,  
Irma Garcia-Aguilar, et al., Intervenor-Defendants-  
Appellants,  
Phillip Runkel, et al., Defendants-Appellants.  
Dist. Ct. No. 80-00517

Gentlemen:

The Court today announced its decision in the above-entitled  
case.

A copy of the Court's opinion is enclosed, and a judgment in  
conformity with the opinion has been entered today as re-  
quired by Rule 36, Federal Rules of Appellate Procedure.

Each party will bear its own costs in this Appeal.

Very truly yours,

John P. Hehman  
Clerk

By Suzanne W. Hogan /s/  
(Mrs.) Suzanne Hogan  
Deputy Clerk

SH:jmb  
Enclosure

AMERICANS UNITED FOR SEPARATION OF CHURCH  
AND STATE, a District of Columbia corporation; Phyllis  
Ball, Katherine Pieper, Gilbert Davis, Patricia Davis, Fred-  
erick L. Schwass and Walter Bergman, Plaintiffs,

v.

The SCHOOL DISTRICT OF the CITY OF GRAND RAP-  
IDS, a Municipal corporation; Phillip Runkel, Superintend-  
ent of Public Instruction of the State of Michigan; State  
Board of Education of the State of Michigan; Loren E.  
Monroe, State Treasurer of the State of Michigan, De-  
fendants,

Irma Garcia-Aguilar and Simon Aguilar, Bruce and Linda  
Bylsma, Robert and Penelope Comer, Clarence and Rosa-  
lee Covert, Scipuo and Janice Flowers, John and Shirley  
Leestma, Intervening Defendants.

No. G 80-517.

United States District Court, W. D. Michigan, S. D.

Aug. 16, 1982.

# MEMORANDUM OPINION

ENSLEN, District Judge.

Asserting transgressions of the Establishment Clause, Plaintiffs seek to enjoin certain cooperative educational arrangements, collectively styled "Shared Time", entered into pursuant to Michigan law by the School District of the City of Grand Rapids and various nonpublic, religiously-oriented, elementary and secondary schools located within, or proximate to, the School District. The challenged programs are conducted by public school teachers in classrooms located [1074] within and leased by nonpublic schools to the public school district. Courses are offered under the supervision and control of the public school district and utilize books and other materials purchased with public funds. Plaintiffs seek a declaration that the Michigan legislature's authorization of funding for these arrangements is violative of the Establishment Clause of the First Amendment of the United States Constitution, as made applicable to the states by the Fourteenth Amendment.<sup>[1]</sup>

## I. The Parties

There are six individual Plaintiffs and one organizational Plaintiff. The individual Plaintiffs are Phyllis Ball, Katherine Pieper, Gilbert Davis, Patricia Davis, Frederick L. Schwass,

[1]

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201 and 2202.

and Walter Bergman, each of whom is a resident in Defendant School District, is a Michigan taxpayer, and opposes the use of public funds by nonpublic schools. The organizational Plaintiff, Americans United for Separation of Church and State, is a District of Columbia corporation composed of persons residing and paying taxes throughout the United States, including the State of Michigan.

The original Defendants are the School District of the City of Grand Rapids; Phillip Runkel, Superintendent of Public Instruction of the State of Michigan; State Board of Education of the State of Michigan; and Loren E. Monroe, State Treasurer of the State of Michigan. A number of individuals, parents of children receiving benefits under the challenged programs, were subsequently permitted to intervene as party Defendants.

[1] At the conclusion of trial, Defendants raised, for the first time, the issue of standing, both with regard to the organizational and individual Plaintiffs. Because the matter of standing is jurisdictional and since a federal court must not exercise its awesome injunctive powers in the absence of jurisdiction, I will resolve those issues *seriatim*.

First, Plaintiffs' Complaint, at paragraph 4, states that:

Americans United for Separation of Church and State (hereinafter designated Americans United) is an association of persons resident in the State of Michigan and elsewhere throughout the United States having as its objective to defend, maintain and promote religious liberty and the constitutional principle of separation of church and state. In keeping with this objective, Americans United oppose the use of public funds for the support in whole or in part of sectarian schools or other private schools whose policies and practices are intended to advance and indoctrinate religion.



Paragraph 21 of Plaintiffs' Complaint states:

It is contrary to the religious conscience of each of the Plaintiffs, and is contrary to the purpose for which the organizational Plaintiff was formed, to be forced by operation of the taxing power to contribute to the propagation of religion in the support of religious schools.

With respect to the organizational Plaintiff, there are no further jurisdictional allegations in the Complaint. At trial, no representative of Americans United testified, and indeed, there was no proof that Americans United represent Michigan taxpayers. Thus, the organizational Plaintiff has failed to allege, or prove, taxpayer standing to challenge the validity of the Shared Time program. *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Rather, it appears that Americans United have attempted to assert standing solely on the basis of some "special status" as a representative of those who oppose the use of public funds for the support of religious institutions. Such "special status" standing was considered and expressly rejected, indeed with respect to the very same organizational Plaintiff, in the Supreme Court's recent decision of *Valley Forge Christian College v. Americans United for Separation [1075] of Church and State*, — U.S. —, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Accordingly, an order dismissing Americans United as Plaintiffs, pursuant to Fed.R.Civ.P. 12(h)(3), will enter this date.<sup>[2]</sup>

[2]

What this does to such organizational plaintiffs as NAACP and the Sierra Club is unclear to me. Perhaps organizational plaintiffs ought to allege and prove representation of taxpayers together with the requisite Article I and nexus criteria set forth in *Flast, supra*. It seems altogether archaic as a matter of pleading, and "technical" in terms of proof. Courts of limited jurisdiction must necessarily concern themselves with such matters in order to find or reject jurisdiction. While this should be a matter of distress to both the Bench and Bar, and especially to the public, it is of no particular moment in this litigation since I find

[2, 3] Consequently, I now address the issue of whether the individual Plaintiffs have sustained their burden with respect to standing. Paragraph 5 of Plaintiffs' Complaint reads:

Each of the individual Plaintiffs is a citizen of the United States and a resident within said school district and pays income taxes and other taxes to the United States and to the State of Michigan and the said school district, and each is a qualified, legal voter registered in the City of Grand Rapids, Kent County, Michigan.

Affidavits were submitted, without objection, by four of the six individual Plaintiffs. Essentially, these affidavits recite that they are citizens of the United States and residents of the Defendant School District who pay federal, state and local taxes, and that they object on the basis of the Establishment Clause to the use of their federal, state and local taxes to support the programs herein challenged. Hence, the individual Plaintiffs have attempted to allege and prove standing to bring the instant action on the basis of their taxpayer status. *Flast v. Cohen, supra*, establishes a two part test:

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is

individual Plaintiffs to enjoy standing. Evidently, an attorney representing an organizational plaintiff is required to be especially wary . . . . This should not be so because it is too reminiscent of the old and discredited formal pleading practice of yesteryear. Moreover, it is silly, and, hence, unjust.

consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction. 392 U.S. at 102-103, 88 S.Ct. at 1953-1954.

Applying that test, I conclude that, like the plaintiff in *Flast*, the individual Plaintiffs satisfy the first part of the test for taxpayer standing. *Flast* limited taxpayer standing to challenges of the exercise of the congressional spending power. As will be developed below, the Michigan legislature's annual appropriation of funding for the Shared Time program is clearly an exercise of its spending power. The individual taxpayers also satisfy the second part of the [1076] *Flast* test. In other words, the individuals have established the required nexuses between their status as taxpayers and the specific constitutional limitation upon the exercise of the spending power, i.e. the Establishment Clause of the First Amendment to the United States Constitution. For the above reasons, I am satisfied that the individual Plaintiffs do indeed have standing.

## II. The State Legislation

The Michigan legislature, like that of many states, has granted extensive authority over the formulation and control

of educational policy to administrative agencies and various bodies at the state and local levels, including some of the defendants to this action. By 1976 P.A. 451, § 1282; M.C.L.A. § 380.1282; M.S.A. § 15.41282, the Michigan legislature provided that:

The board of a school district shall establish and carry on the grades, schools, and departments it deems necessary or desirable for the maintenance and improvement of the schools, determine the courses of study to be pursued, and cause the pupils attending school in the district to be taught in the schools or departments the board deems expedient.

Pursuant to the above section, the Michigan Supreme Court has determined that local boards of education have discretionary authority to provide shared time instruction to part-time public school students. *Traverse City School District v. Attorney General*, 384 Mich. 390, 411, n. 3, 185 N.W.2d 9 (1971).<sup>[3]</sup> Moreover, Michigan appellate courts have uniformly held that the provision of shared time instruction by local boards of education on premises leased from nonpublic schools under conditions of public school supervision and control violates neither the United States nor the Michigan Constitutions. *Traverse City School District v. Attorney General*, *supra*; *Citizens to Advance Public Education v. State Superintendent of Public Instruction*, 65 Mich.App. 168, 237 N.W.2d 232 (1975), *lv. app. den.*, 397 Mich. 854 (1976). *Contra, Americans*

### [3]

The *Traverse City School District* case arose from a declaratory judgment action to test the validity of the Michigan Attorney General's Opinion, OAG 4715, construing Proposal C as prohibiting the expenditure of public monies for shared time and auxiliary services. For a discussion of the sequence of events by which Proposal C became a part of the Michigan constitution read Justice Adam's Opinion, appearing in 384 Mich. at 437, 185 N.W.2d 9.



*United for Separation of Church and State v. Porter*, 485 F.Supp. 432 (W.D.Mich.1980).

Local boards of education, including Defendant School District for the City of Grand Rapids, also have statutory authority to lease real and personal property, pursuant to 1976 P.A. 451, § 331(1); M.C.L.A. § 380.331; M.S.A. § 15.4331:

The school district shall be a body corporate, governed by a board of education; may sue and be sued; and may take, hold, lease, sell, and convey real and personal property, including property outside its corporate limits, and property received by gift, devise, or bequest, as the interest of the school district may require. Land outside the school district shall not be acquired unless approved by a 2/3 vote of members elected to and serving on the board.

In the exercise of its general power to appropriate public funds derived from the Michigan Constitution, the Michigan legislature has authorized the payment of state school aid funds to local boards of education for part-time public school students receiving shared time instruction on premises leased from the nonpublic schools. 1979 P.A. 94, the State School Aid Act of 1979, §§ 6(1) and (2) and 111(3); M.C.L.A. § 388.1601, *et seq.*; M.S.A. § 15.1919(901), *et seq.* Pursuant to this enactment, the Michigan Department of Education has implemented Administrative Rules R 340.6 and R 340.7, Administrative Code, 1979, Vol. II, pp. 2732-2733, and "Local District Summary; 1981 Fourth Friday Report". The above statute, the administrative rules, and the reporting forms make no distinction based upon the situs of shared time instruction.

[1077] Thus, the legislature has authorized payment of state school aid funds without regard to whether shared time in-

struction occurs on premises owned or leased by the local board of education.[4]

### III. Factual Background

Although the parties, as expected, propose differing interpretations of the facts and urge opposing views of the legal consequences which flow therefrom, the Court, after careful consideration of the entire record, believes that the salient facts underlying this litigation are largely undisputed. The basic facts are set forth below; more detailed facts will be elaborated within that section of the Opinion to which they pertain.

At the outset it should be noted that, throughout this proceeding, the term "shared time" has been used to describe both the Shared Time and the Community Education programs.[5] Individually and collectively both programs have enjoyed a

[4]

Michigan state school aid funds are derived primarily from the state sales tax, Mich. Const. art. 4 § 30 and supplemented by an excise tax on spirits, 1979 P.A. 94, § 12; M.C.L.A. § 388.1612; M.S.A. § 15.1919(912). In the event that there is a deficiency in state school aid funds, monies are then appropriated from the general fund by the legislature. 1981 P.A. 36, § 1; M.C.L.A. § 388.1611; M.S.A. § 15.1919(911). The exact amount of state school aid funds attributable to any shared time program in Michigan is determined by converting, through the use of a complex formula, the number of part-time public school pupils into the comparable number of Full Time Equivalent (FTE) students.

[5]

While Plaintiffs attack the entire Grand Rapids Shared Time program, their attack upon Community Education programs is limited to those portions conducted in facilities rented from nonpublic schools and offered to full time nonpublic school students. Moreover, Plaintiffs stipulated to the dismissal of the Outdoor Education, Drownproofing and Drivers' Education courses from this suit. Furthermore, Plaintiffs suit in no way challenges any aspect of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241a *et seq.*



steady growth since their inception. For the 1978-79 school year, there were 9,494 nonpublic school students enrolled in the combined programs; the payment of state school aid funds attributable to those students totalled \$1,397,577.20. By the 1981-82 school year, the programs had been extended across county lines, the number of participating nonpublic school students exceeded 11,000, and state aid approached \$6,000,000.<sup>[6]</sup> Besides being offered through the Defendant School District, both programs contain additional common characteristics which will be discussed immediately below. Thereafter, because Shared Time and Community Education are individual and distinct educational programs, they will be discussed separately.

In both the Shared Time and Community Education programs, Defendant School District utilizes a standard form lease to gain access to nonpublic school classrooms and other facilities. The lease specifies a rental charge of \$6 per class per week at the elementary schools, and \$10 per class per week at the secondary schools. In none of the leases is there any mention of the particular room, space or facility which the instrument governs, and they do not, by their terms, restrict public school employees or students from occupying or using any facility within the nonpublic schools. Indeed, teachers' rooms, libraries, lavatories and similar facilities used in connection with the let premises are generally made available to the School District.

[6]

For the 1981-82 school year, the Defendant School District received \$6 million in state school aid funds for the operation of the Shared Time and Community Education programs. However, those programs operated on a budget of approximately \$3 million, leaving the remaining \$3 million as "profit" for the School District. Thus, while the Defendants argue pure altruism in extending the challenged programs to nonpublic schools, the "profit" factor reveals an additional motivation.

No crucifixes, religious symbols or artifacts may be displayed in leased facilities. Before any nonpublic school facility may be utilized by either of the public school pro-[1078]grams, it is necessary to "desanctify" the facility to ensure that no such symbols are exhibited. In many instances, religious symbols or artifacts, or both, exist in adjoining corridors, surrounding rooms, or other facilities used in connection with the leasehold.

The School District requires its instructors to post signs within the class area designating it as a public school classroom. At least one instructor testified that she carried the "public school" sign with her as she moved throughout the nonpublic schools. There are no signs posted outside of the nonpublic schools indicating that public school courses are being offered therein, or that the facilities serve as a public school annex.

Almost without exception, those students attending Shared Time and Community Education courses in facilities leased from a nonpublic school are the very same students who attend that particular nonpublic school during the regular school day. Thus, there is a virtual identity between students receiving Shared Time or Community Education instruction at any given nonpublic school and the students regularly attending that nonpublic school.

Shared Time and Community Education instruction involves 470 full and part-time teachers. Every Shared Time instructor is employed in accordance with the ordinary hiring procedures adopted by the School District for the City of Grand Rapids. A significant portion of the Shared Time instructors previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed. The majority of Community Education

offerings on facilities leased from a nonpublic school are taught by instructors employed full time by the very same nonpublic school.

Shared Time is a program wherein the school district offers substantive courses from its general curriculum to nonpublic school students during regular school hours. As noted in *Traverse City School District v. Attorney General, supra*, 384 Mich. at 407, n. 2, 185 N.W.2d 9, such shared time classes have been offered in various Michigan school districts for more than 60 years. In their original form, shared time courses provided public school instruction for nonpublic school pupils at public school sites in subjects widely regarded as being secular. Typical shared time course offerings included mathematics, reading, physical education and art. Perhaps the most striking difference between the Shared Time program at issue, and the prototypical program is that the instant arrangement is conducted *entirely* within the participating nonpublic schools in facilities leased by the School District. This Grand Rapids variation on the shared time arrangement was initiated in 1976, following a Michigan Court of Appeals decision upholding the constitutionality of shared time instruction on leased premises under conditions of public school control. *Citizens to Advance Public Education v. State Superintendent of Public Instruction, supra*.

During the 1981-82 academic year, forty-one private schools participated in the Grand Rapids Shared Time program. With the exception of physical education, industrial arts, music and art, the educational opportunities offered through the program are, in the main, supplementary to the core curriculum of the nonpublic schools. The basic Shared Time course titles include: Art, Music, Physical Education, Industrial Arts, Educational Park, Remedial and Enrichment Mathematics, and Remedial and Enrichment Reading. Various other courses have been offered through Shared Time instruction; they in-

clude the following: Humanities, Language Arts, Home Economics, Science, Spanish, French, Latin, Business, Social Studies, Yearbook, Calculus, Creative Writing, Psychology, Journalism, Criminology, and Advanced Biology. The specific courses available through the elementary level Shared Time programs would not otherwise be available in any of the nonpublic schools, and are not required for graduation or progression to the next [1079] grade. The participating private secondary schools, however, require for graduation a course in physical education. Such courses are offered at these schools *only* on a Shared Time basis.

Notwithstanding the numerous Shared Time courses, the amount of time in which the average nonpublic school student receives such instruction is a relatively small portion of that student's total educational experience. There was testimony that ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction. Typically, a nonpublic school student does not participate in every Shared Time course offered at his school.

In the early 1970's, the School District of the City of Grand Rapids instituted the Community Education program in the Grand Rapids Public Schools. Beginning in approximately 1975, that program, which offers to students a diverse array of educational and other enrichment opportunities, was offered for the first time, at facilities leased from those nonpublic schools which elected to participate. Wherever offered, Community Education courses are taught by Grand Rapids public school employees under the supervision and control of the public schools. Classes offered at nonpublic school sites are now, and have always been, conducted in facilities leased from the participating private institutions.

Unlike Shared Time, the Community Education offerings at issue are scheduled outside of regular school hours. Partici-



pating schools, especially those at the elementary level, host "after school" or "leisure time" Community Education courses which, as the name implies, commence at the conclusion of the regular school day. Additionally, at the participating nonpublic high schools, Community Education courses are offered immediately preceding the regular school day, during the "zero hour." Many such "zero hour" classes offer substantive rather than enrichment courses; indeed, certain of the secondary level Community Education courses may be taken for credit toward graduation. "Zero hour" courses include: Typing, Business Machines, Computer Programming, Photography, Retailing, Communications, Bookkeeping and Astronomy.

Community Education instruction is completely voluntary and will be offered only in the event that twelve or more students are enrolled. Because of this rule of twelve, a well known teacher able to attract students is essential to the establishment of a successful Community Education program. For that reason, and with respect to Community Education only, the School District accords a preference in hiring to instructors already established with students in the building where the nonpublic course will be offered. Currently, there are over 300 Community Education instructors employed on a part-time basis by the School District of the City of Grand Rapids. The majority of those part-time Community Education instructors are employed full time by the situs school, whether public or private. As a consequence, virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school.

Of the nonpublic schools presently participating in the Community Education program, none have ever provided an identical course to their students. In that respect, Community Education courses do not represent substitutes for courses formerly offered at nonpublic schools. Although certain Com-

munity Education courses offered at nonpublic school sites are not offered at the public schools on a Community Education basis, all Community Education programs are otherwise available at the public schools, usually as a part of their more extensive regular curriculum.

Finally, because a participating nonpublic school's calendar is not necessarily coterminous with that of the public school's, the Defendant School District has attempted to accommodate the nonpublic schools. For example, it rearranges schedules during re-[1080]ligious holidays not recognized by the public schools. At the elementary level, Community Education courses span a twelve week term of shorter duration than the regular nonpublic school semester. At the secondary level, all Community Education programs generally follow the public school calendar.

#### IV. *The Nonpublic Schools*

[4] Approximately forty of the Grand Rapids area nonpublic schools which have elected to participate in the Shared Time and Community Education programs are, by their own admission, "religiously oriented." The challenged programs have, at one time or another, been offered in facilities rented from 28 Roman Catholic schools, 7 Christian schools, 3 Lutheran schools, 1 Seventh Day Adventist school and 1 Baptist school. For purposes of general discussion, most of those schools can be readily divided on the basis of religious affiliation into three categories, to wit: Roman Catholic, Christian, and Lutheran. Plaintiffs introduced abundant evidence tending to demonstrate that a substantial portion of the function of the participating nonpublic schools' "functions are subsumed in the religious mission . . ." *Hunt v. McNair*, 413 U.S. 734, 743, 93 S.Ct. 2868, 2874, 37 L.Ed.2d 923 (1973).



### A. The Catholic Schools

The elementary and secondary Roman Catholic schools participating in the challenged programs provide their 6,233 students with an opportunity to receive religious instruction. Sister Marie Heyda, author of the book *Catholic Central and West Catholic High Schools*, candidly testified, that the following sentence in her book states the philosophy of education in Catholic schools:

Certainly *religion and the values of the spiritual life must always* be an integral part of the atmosphere of the Catholic high school for in the modern age *they are the only reason for its being*. *Id.* at p. 80. (Emphasis supplied).

The *St. Jude School Parent Handbook*, contains this typical statement of the philosophy of Catholic education:

A God oriented environment which *permeates* the total educational program.

. . . . .

Opportunities to pray, worship and celebrate as members of a Christian community.

A Christian atmosphere which guides and encourages participation in the church's commitment to social justice.

A continuous development of knowledge of the Catholic faith, its traditions, teachings and theology. (Emphasis supplied).

Each of the Catholic schools is governed by its own Board of Education, normally composed of the pastor and lay mem-

bers, elected by constituents of the parish with which the school is associated. Although there is no such requirement, nearly all Board members are adherents of the Roman Catholic religion.

Typically, on a daily basis the Catholic schools include some form of prayer or religious observance; on a weekly basis they include actual attendance at religious services. Moreover, the affidavit of Ronald J. Cook, Superintendent of Schools for the Roman Catholic Diocese of Grand Rapids, states at paragraph 21 that: ". . . It is the policy of the Grand Rapids Catholic schools ordinarily to require students to attend religious instruction classes and religious services either at the Catholic school or at the church of his own faith if the student is not Catholic". No less than 85 percent of the students and 90 percent of the instructors at the combined schools are Catholic.

### B. The Christian Schools

Each of the elementary and secondary Christian schools is operated by the Grand Rapids Christian School Association, an association composed of parents and others [1081] who support Christian education. Membership in the Association is *restricted* to those who *subscribe* to a *doctrinal Basis*. The Basis, which is contained within the Association's Bylaws, provides:

*Section 1.3 Basis.* The supreme standard of the Association shall be the scriptures of the Old and New Testament, herein confessed to the the [sic] infallible Word of God, as these are interpreted in the historic Reformed confessions: The Belgic Confession, Heidelberg Catechism, and Canons of Dort.

Acknowledging that that [sic] these Scriptures, in instructing us of God, ourselves, and God's creation, contain basic

principles authoritative and relevant for education, we hold that:

(a) The authority and responsibility for education (sic) children resides in the parents or guardians of the children and not in the state or the church. Parents, however, may delegate their authority to those who can competently carry out this God-given parental right.

(b) The primary aim of a Christian parent is (sic) securing the education of his child should be to give him a Christian education—that is, an education whose goal is to equip the child for living the Christian life as a member of the Christian community in contemporary society.

(c) Christian parents, when delegating the authority for educating their children, should delegate it to those institutions which seek to provide Christian education for the student.

(d) The responsibility for maintaining such institutions rests on the entire Christian community.

(e) The Christ proclaimed in the infallible Scriptures is the Redeemer and Renewer of our entire life, thus also of our teaching and learning. Consequently in a school which seeks to provide a Christian education it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but *the Word of God must be an all-prevailing force in the educational program.* (Emphasis Supplied).

The Association elects a Board of twelve trustees to operate the schools and make policy decisions. Currently, all twelve

trustees are members of the Christian Reformed Church. Article VI of the Bylaws grant to the trustees authority with respect to educational policy:

*Section 6.1 Educational Authority.* The Board of Trustees of the Association shall have general and plenary authority, power [sic] and responsibility with respect to the educational policies in its schools, including, without limitation, the following:

- (a) To determine and establish the curricula and courses of study to be taught in its schools;
- (b) To establish grades and departments in its schools;
- (c) To hire and contract with principals, teachers, librarians and other faculty [sic] and staff, and assign such persons to its [sic] schools;
- (d) To specify, purchase and furnish books and other educational materials, supplies and equipment;

. . . . .

- (g) To establish policies for interschool functions and relationships;
- (h) To develop, establish and carry into effect plans for the development of Christian education in those areas which are or may be served by the Association.
- (i) To make rules and regulations relating in any way to the administrative and educational policies to be followed in its schools.

The evidence established that for the past three school years 88 percent of the students of the Grand Rapids Christian School Association belonged to the Christian Reformed Church or the Reformed Church in America. An informational brochure

distributed by Creston-Mayfield Christian [1082] School, a member of the Grand Rapids Christian School Association, relates that: "Christian parents who express their commitment to Christian education are welcome to enroll their children. They will be accepted without regard to race, color, national or ethnic origin." The brochure's conspicuous omission of any reference to "religion" is not inadvertent. Indeed, the application form for admission to the Christian School Association requires the parent to either subscribe to the Basis or to agree to have his children taught according to the Basis principles.

The *Seymour Christian School Staff Handbook*, at section seven, discusses the attributes of a Christian teacher as follows:

#### A CHRISTIAN TEACHER

1. A Christian teacher is first of all a servant of his Lord and Savior. His concepts of God, man, and the world find their authority in the Bible. His doctrinal stance requires that he interpret his subject matter from a Christian point of view. His emotional maturity, intellectual competency, and spiritual vibrancy is obvious. His task is to teach God's children about God's world in the light of God's word.

• • • • •

3. The Christian teacher sees his students as image bearers of God who will be active in His Kingdom now and forever. He will use *every means available* to give his students this perspective. He will be a living example of Christian behavior. He will conspicuously teach Christian virtues. *He will promote a Christian sense of values in his classroom* by teaching respect for authority, respect for the property of others, desire to cooperate, enthusiasm for work, concern for others, and most importantly, sub-

mission to the Lordship of Christ. The teacher will be sensitive to his student's academic and spiritual needs. (Emphasis supplied.)

The majority of instructors employed by the Grand Rapids Christian School Association are members of the Christian Reformed Church.

#### C. The Lutheran School

The only Lutheran school presently participating in the Shared Time and Community Education programs is Immanuel-St. James Lutheran School. The educational philosophy of that institution is perhaps best expressed in the "Credo on Christian Education" contained within the *Immanuel-St. James Lutheran School Handbook*:

#### IMMANUEL-ST. JAMES CREDO ON CHRISTIAN EDUCATION

WE BELIEVE that Christian education is a vital aspect of the Church's mission, commanded by God through the Great Commission.

WE BELIEVE that Christian education is directed toward the total development of people, providing for their spiritual, intellectual, emotional, social and physical needs.

WE BELIEVE that Christian education is a responsibility of all believers toward all people.

WE BELIEVE that the purpose for Christian education is to teach the Christian faith through

- (a) instruction in God's word
- (b) living in relationships of love and forgiveness.



WE BELIEVE that an effective program of Christian education is based on a distinct theology and determines its curriculum by taking into account current world conditions.

WE BELIEVE that effective education is achieved as quality learning programs relate the Christian faith in every aspect of life.

WE BELIEVE that the family exerts much influence on a child's total education, and that the church must equip adults for their important role in Christian education.

[1083] This philosophy is reaffirmed in a section titled: "The Goals of Education", contained in the same booklet which states, in part, that the goals of Lutheran education involve:

1. Leading the child to faith in the Lord Jesus Christ, and keeping him/her in that faith to eternal life in heaven.
2. Helping the child in Christian growth in all relationships of life, such as the family, the Church, the State, the relationship of friendship, of employment and labor, of art and culture.

Immanuel-St. James Lutheran School is a joint effort of the members of Immanuel and St. James Lutheran congregations. The Voters Assemblies of each of these congregations has established a joint Board of Education to direct and conduct the affairs of the school. This joint Board of Education consists of members elected from each participating congregation.

Immanuel-St. James Lutheran School is housed in two separate buildings, located on a site which adjoins a Lutheran church. Prayer and religious instruction are part of the daily curriculum at the school. In addition to the daily formal study

of the Lutheran faith and daily devotions, the staff and the pupils assemble on a weekly basis, as well as on days of special religious import, for devotional services. Students in the school are expected to be present during religious instruction and services.

At page 6 of the *Immanuel-St. James Lutheran School Handbook* there appears a section captioned: "Distinctive Features of Immanuel-St. James Lutheran School", which reads:

#### 1. GOD AND HIS WORD ARE CENTRAL.

The Holy Bible influences all lessons and activities in our Christian Day School. Through Scripture the Holy Spirit works to increase the child's understanding of himself, his purpose, his destiny, and his Lord.

#### 2. THE CHILD RECEIVES THROUGH, (sic) SYSTEMATIC INSTRUCTION IN THE TEACHING OF CHRISTIANITY.

Christian teachers lead the child in daily study of God's word and in prayer and worship. Particular attention is given to clarifying the story of sin and salvation. In addition, the pupil is trained to practice his Christianity. Guided by teachers and fellow pupils, he grows in Christian knowledge, attitude and conduct.

#### 3. THE CHILD RECEIVES A THOROUGH TRAINING IN THE COMMON SCHOOL SUBJECTS.

The child is instructed in all the common school branches of learning, as prescribed by the state. But all such instruction is given from a Christian point of view. The child is thus protected from the dangers of a purely secular schooling.

#### 4. THE CHILD LIVES IN A CHRISTIAN ENVIRONMENT.

The devil constantly seeks to undermine the Christian's faith. The importance of school environment, therefore, is not to be underestimated. True, misunderstandings and incidents of misbehavior and conflict will occur in this school also. But the power of sin is lessened when Christian teachers and children live in intimate relation with their Lord, and in loving concern for one another's growth in holy living.

#### 5. THE CHILD GROWS INTO HIS CHURCH.

More and more active workers in the local congregation and in the church at large are needed. Leaders, pastors, teachers, and lay persons—must be developed to guide the church's work. Members who remain faithful to the Lord, and who are wise stewards of their time, abilities, and possessions, are essential. Immanuel-St. James Lutheran School trains children for just such roles.

With respect to the admission policy, Kraig Johnson, the principal of Immanuel-St. James, candidly admitted that preference is given to members of the Lutheran [1084] faith. In that regard, paragraph 7 of the official admissions policy for the school states:

7. Members of the sponsoring congregations are given first opportunity to enroll their children. Children of non-member families are accepted on the following basis and availability of space:

- a) children from sister congregations;
- b) children from other Lutheran churches;
- c) children from other Christian schools;
- d) and others who desire a Christian education.

The effect of that admissions policy on the enrollment of Immanuel-St. James is substantial. Currently, by Mr. Johnson's own estimate, approximately six-sevenths of the students enrollment are Lutheran. Moreover, instructors keep attendance records on church and Sunday school attendance, and perfect church and Sunday school attendance awards are given at the end of each school year.

An individual interested in obtaining a teaching position at Immanuel-St. James Lutheran School must meet stringent requirements. Those are stated concisely at page 8 of the *Immanuel-St. James Lutheran School Handbook*:

The teachers of Immanuel-St. James Lutheran School meet all the requirements of Synod for its parochial school teachers and the requirements of the State of Michigan, Department of Education. The teachers have pledged themselves to use every opportunity for continued spiritual and professional growth. They are personally interested in the complete welfare of each individual child. Our teachers have always been known to give unselfishly of their time to students and parents who have special needs.

Despite the fact that the evidence revealed several distinguishing features, the character of the participating non-public schools is fundamentally and substantially comparable to that of the nonpublic schools involved in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), *reh. den.*, 404 U.S. 876, 92 S.Ct. 24, 30 L.Ed.2d 123 (1971). Based upon the massive testimony and exhibits, the conclusion is inescapable that the religious institutions receiving instructional services from the public schools are sectarian in the sense that a substantial portion of their functions are subsumed in the religious mission. See also, *Committee for Public Education v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217



(1975), *reh. den.*, 422 U.S. 1049, 95 S.Ct. 2668, 45 L.Ed.2d 702 (1975); and *National Coalition for Public Education v. Harris*, 489 F.Supp. 1248, 1262-1267 (SDNY1980), *app. dismiss.*, 449 U.S. 808, 101 S.Ct. 55, 66 L.Ed.2d 11 (1980), *reh. den.*, 449 U.S. 1028, 101 S.Ct. 601, 66 L.Ed.2d 491 (1980).

### V. The Constitutional Standard

[5, 6] The Court's task is to assess the challenged Shared Time and Community Education programs against the limitations imposed by the Establishment Clause of the United States Constitution. The First Amendment states in pertinent part that: "Congress shall make no law respecting the establishment of religion. . . ." This terse prohibition, which is applied to the states through the Due Process Clause of the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), is subject to a decidedly flexible, and constantly evolving interpretation by the courts.<sup>[7]</sup> Due to the flexible construction of the clause, and in the absence [1085] of rigid, precisely stated constitutional prohibitions, it is necessary to appreciate the primary evils against which it was intended to afford protection: ". . . sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commissioner*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970).

[7]

In a letter to Danberry Baptist Association, dated January 1, 1802, Thomas Jefferson expressed his view as President that: "A wall of separation between church and state" did not permit a national day of fasting. Indeed, there is some reason to speculate that Jefferson may not have agreed with *Cantwell* in later Supreme Court decisions invoking his famous metaphor. Whether I agree with Jefferson or the Supreme Court is of no moment. I must adhere to the Supreme Court and its teachings, not Jefferson's. See, "Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor", 1978 *Brigham Young University Law Review*, pp 645-674, for a thorough review of his speculation.

For many years the Supreme Court has endeavored to fashion guidelines distinguishing permissible from impermissible aid to religious schools. Early in its endeavor, the court placed great emphasis on the concept of neutrality. See, e.g. *Abington School District v. Schempp*, 374 U.S. 203, 215, 83 S.Ct. 1560, 1567, 10 L.Ed.2d 844 (1963). Eventually, this neutrality principle was converted into broader, cumulative criteria. An analysis of this matter cannot begin without careful consideration of those guidelines, a tripartite test, which is clear in expression, if not in operation.

First, the statute must have a *secular legislative purpose*; second, its principle or *primary effect must be one that neither advances nor inhibits religion*, . . .; finally, the statute *must not foster 'an excessive government entanglement with religion.'* . . . *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). (Emphasis supplied.)

Bearing in mind the judicially created flexibility of those criteria, I will proceed to consider the challenged instructional programs in terms of the three tests: purpose, effect, and entanglement.

#### A. Purpose

[7] The most rudimentary requirement in a constitutional system designed to assure religious independence is that state action at least be justifiable in secular terms. Actions not justifiable in that way will normally violate the Establishment Clause. Although the requirement of a secular purpose is rarely decisive, the requirement did prove decisive in at least one famous case, involving an Arkansas statute adopted to prohibit the teaching in public schools of the theory that man evolved from other species. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). See also, *Daniel v. Waters*, 515 F.2d 485 (CA 6 1975).



[8] The purpose of the Shared Time and Community Education programs are manifestly secular. Inquiry into the purposes of the School District in establishing the programs, and the Michigan legislature in authorizing the necessary funds, provides no basis to form a conclusion that there was any purpose or intent to advance religion unconstitutionally. It is widely recognized that both the state and local governmental bodies will always possess legitimate concerns for obtaining and even upgrading educational systems.<sup>[8]</sup> The purpose of the Board of Education of the Grand Rapids Public Schools is amply stated in its officially adopted "Philosophy of Education":

2. The Grand Rapids Board of Education is committed to provide for each student, an equal opportunity for a quality education.

Education is an endeavor or process which seeks to develop an excellence of mind, spirit, and attitude of which man is so uniquely capable and having as its ultimate goal the happiness and fulfillment of each individual and the welfare of society.

The Board recognizes that no two students are alike; they have differing needs, differing abilities, differing aspirations. The Board seeks the fully developed individual, maximizing his potential, [1086] talents, and interests. The Board is concerned for the exceptional child and will provide opportunities for both the talented and the handicapped.

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[8]

Plaintiffs' counsel, referring to the programs as "reverse shared time", conceded during oral arguments that the least vulnerable aspect of the Shared Time and Community Education programs is their purpose.

Education in Grand Rapids Public Schools shall enable each individual to:

- A. Acquire the basic skills.
- B. Apply rational intellectual processes to the identification, consideration, and solution of problems.
- C. Develop a comprehension of a changing body of knowledge of the various disciplines.
- D. Learn good health and safety habits as well as muscle coordination.
- E. Experience an environment that will motivate and develop an inquisitive mind capable of critical and objective thinking and independent study.
- F. Progress toward a marketable skill.
- G. Realize the interdependence and the common destiny of all citizens of the United States.
- H. Become a citizen who has a sense of self respect, who respects the person and rights of all others, who accepts the responsibilities and disciplines of our society, and who respects the law.
- I. Understand and deal with social problems thoughtfully and objectively.
- J. Have an opportunity for continuing education.

Education is a cooperative endeavor requiring reciprocal effort on the part of the teacher and students supported by the cooperation of parents and the community.

The Grand Rapids Public Schools shall utilize all available facilities and equipment to provide a healthful and stimulating educational environment. School facilities shall be used for the regular program, continuing education, and the community.

It is exceedingly clear, therefore, that Defendant School District, through its laudable "philosophy", instigated Shared Time and Community Education for purely secular purposes. The State Defendants cannot be said to have had a constitutionally impermissible purpose either. I believe that Jefferson would share the views of Plaintiffs and Defendants on legislative purpose. (See footnote 7). For the foregoing reasons, I find the purpose constitutional.

### B. Primary Effect

[9] The second aspect of the constitutional standard requires me to decide whether the "principle or primary effect" of the program is one that "neither advances nor inhibits religion." *Lemon v. Kurtzman*, 403 U.S. at 612, 91 S.Ct. at 2111. Ordinarily, a law which confers a benefit upon all citizens equally, without regard to religious affiliation, will not have a prohibited effect.

It is the contention of Defendants that the Shared Time and Community Education programs fit within the "child benefit principle" in both conception and administration and, thus, do not have the effect of impermissibly advancing religion. See, *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1971),<sup>[9]</sup> and *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). The educational programs at issue are certainly consistent with the School District's Philosophy of Education, which is dedicated to the provision of secular educational opportunities for the entire community. There was testimony, and other

[9]

Jefferson's "wall of separation between church and state" was rescued from near-obscurity by Justice Black in *Everson*, citing it as the sole historical justification for his definition of the Establishment Clause. See especially, 330 U.S. at 15-16, 67 S.Ct. at 511-512, and *Brigham Young Law Review*, footnote 8, *supra*.

evidence, presented indicating that both of these cooperative educational arrangements do in fact have a positive impact on the participating nonpublic school students.

Because, as was previously noted, the constitutional standards are flexible by de- [1087] sign, what amounts to an impermissible primary effect may best be gleaned by contrasting the "child benefit principle" cases on the one side, with cases finding an impermissible effect on the other.

In *Everson v. Board of Education*, *supra*, Justice Black, writing for the majority, upheld against an establishment clause attack a New Jersey statute authorizing reimbursement to parents of money expended for bus transportation of their children to and from school, including children attending religious schools. Delivering the opinion he included these comments:

It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. (US) 655, 22 L.Ed. 455; *Parkersburg v. Brown*, 106 U.S. 487, 1 S.Ct. 442, 27 L.Ed. 238; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green v. Frazier*, 253 U.S. 233, 240, 40 S.Ct. 499 [501], 64 L.Ed. 878, 881. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power to which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment



did not strip the states of their power to meet problems previously left for individual solution. 330 U.S. at 6-7, 67 S.Ct. at 507.

*Everson* is replete with other references to general public welfare legislation and is considered the seminal point in the development of the "child benefit principle." See also, *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930).

More than two decades later, the Supreme Court, in an Opinion by Justice White, reaffirmed the continued vitality of the child benefit principle in *Board of Education v. Allen*, *supra*<sup>[10]</sup>. The Court held that a New York statute requiring local public school authorities to lend secular textbooks free of charge to all students in grades 7 through 12, including students attending religious schools, was not infirm under the First Amendment. The holding in *Allen* was premised upon the fact that the books covered only secular subjects, were available to all students, conferred a benefit upon the child's parents rather than upon religious schools, and that ownership of the books remained in the state. The Court concluded that, as in *Everson*, New York was merely "extending the benefits of state laws to all its citizens." 392 U.S. at 242, 88 S.Ct. at 1925.

After *Everson* and *Allen* it is clear that certain limited forms of general welfare state aid may be channeled to pupils attending private schools. In *Walz v. Tax Commissioner*, *supra*, the traditional tax exemption of property used for religious, educational or charitable purposes was upheld under a similar rationale. See generally, *Americans United for Separation of*

[10]

Despite scholarly attack on the Jefferson metaphor, after its use 13 times in *McCullum*, and *Zorach*, Justice Black persisted in using it in this 1968 dissent.

*Church and State v. Blanton*, 433 F.Supp. 97 (M.D. Tenn.), *summ. aff'd.*, 434 U.S. 803, 98 S.Ct. 39, 54 L.Ed.2d 65 (1977).

In contrast to the "child benefit" cases, numerous other cases have invalidated educational programs, after determining that their primary effect impermissibly advanced a sectarian mission. The Supreme Court, in *Committee for Public Education and Religious Liberty v. Nyquist*, *supra*, invalidated three New York programs, to wit: a maintenance and repair provision, a tuition reimbursement provision, and a tax credit provision. The maintenance and re [1088] pair provision authorized unrestricted grants, directly to religious schools with the amount depending on the number of pupils. The court found that the undeniable primary effect of those grants was "to subsidize and advance the religious mission of sectarian schools." 413 U.S. at 779-780, 93 S.Ct. at 2968-69. The tuition reimbursement program enabled parents to obtain reimbursement for tuition paid at religious schools. Noting that, in the absence of definite restrictions guaranteeing separation between the secular and the religious functions of the schools, the court held that reimbursement of tuition payments had the effect of providing direct aid to the schools by offering parents an incentive to send their children to such schools. With respect to the tax credit provision, the court also held that it provided a direct incentive to parents.

*Nyquist* attempted to clarify the test for distinguishing the primary from the secondary effects of government programs, which, like the instant matter, have both secular and religious effects. In that respect, the Supreme Court noted: "Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." 413 U.S. at 783-784, n. 39, 93 S.Ct. at 2970-2971, n. 39. In a sense, *Nyquist* transformed the "primary



secular effect" aspect of the constitutional test into a requirement that any non-secular effect be remote, incidental and indirect. Accordingly, this shift in standard compels a rigorous and more searching analysis.

*Sloan v. Lemon*, 413 U.S. 825, 93 S.Ct. 2982, 37 L.Ed.2d 939 (1973), *reh. den.* 414 U.S. 881, 94 S.Ct. 30, 38 L.Ed.2d 128 (1973), decided on the same day as *Nyquist*, invalidated a Pennsylvania tuition reimbursement program. The Supreme Court, finding that the Pennsylvania program was indistinguishable from the New York program invalidated in *Nyquist*, noted that: ". . . at bottom its intended consequence is to preserve and support religion-oriented institutions." 413 U.S. at 832, 93 S.Ct. at 2986.

*Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 93 S.Ct. 2814, 37 L.Ed.2d 736 (1973), involved a New York statute authorizing cash reimbursements for the preparation, administration, and grading of certain state-mandated examinations. On direct appeal, the Supreme Court found that the statute violated the primary effect portion of the constitutional standard because it did not effectively restrict the use for which the funds could be put, and because there it did not distinguish between tests which included religious content and tests which were entirely secular.

In 1974, in an attempt to replace the defective aid plan of *Levitt*, the New York legislature enacted another statute that authorized reimbursement to nonpublic schools for the costs of performing state-mandated pupil testing and record keeping. The second statute differed from the first in two important respects: First, the new statute did not reimburse the nonpublic schools for the preparation, administration, or grading of teacher prepared tests. Rather, the tests were prepared by the State of New York. This change was evidently designed to eliminate teacher and administrative discretion which was

the subject of criticism by the court in *Levitt*. Secondly, the new statute provided a method for auditing payments made to the school by the state, thereby insuring that reimbursement was made only for actual costs. After a circuitous route through the courts, this second statute was ultimately upheld by the Supreme Court in *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980). Noting the distinctions between the two statutes, the court reasoned that because the nonpublic schools retained no control over the content of the tests or the results thereof, cash reimbursements to private schools do not constitute direct aid to religion provided there are ". . . ample safeguards against excessive or misdirected reimbursement." 444 U.S. at 659, 100 S.Ct. at 849. The court emphasized the following caveat: "Of course, under the relevant cases the outcome would likely be different *were there no effective means for insuring that the cash reimbursements would cover only secular services.*" 444 U.S. at 659, 100 S.Ct. at 849. (Emphasis supplied.)

In the interim, between the release of *Levitt* and *Regan*, the Supreme Court decided several cases which are important to the present discussion. *Meek v. Pittenger*, *supra*, involved a challenge to the constitutionality of Pennsylvania statutes authorizing public school authorities to: (1) lend textbooks and instructional material and equipment, and (2) supply professional staff and supportive materials to provide auxiliary services, to qualifying nonpublic schools, many of which maintained religious affiliations. I think *Meek* is germane because the Court, consistent with its decision in *Lemon*, declared unconstitutional a program providing salaries for teachers who supplied secular services to parochial elementary schools. The teachers in *Meek*, however, unlike those in *Lemon*, were hired by the state and were not under the control of the parochial schools. The Court was not convinced by the argument that public school teachers could be self-policing and incapable of

being diverted to the advancement of religion. The Court determined that the parochial schools were sectarian and that secular and sectarian activities could not be separated and held that direct subsidy would have the impermissible effect of aiding religion, declaring that:

We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools, like the expenditure of state funds to support the basic educational program of those schools, necessarily result in the direct and substantial advancement of religious activity. For decisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained.

In *Earley v. DiCenso*, a companion case to *Lemon v. Kurtzman*, *supra*, the Court invalidated a Rhode Island statute authorizing salary supplements for teachers of secular subjects in nonpublic schools. The Court expressly rejected the proposition, relied upon by the District Court in the case before us, that it was sufficient for the State to assume that teachers in church-related schools would succeed in segregating their religious beliefs from their secular educational duties.

'We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. . .

' . . . But the potential for impermissible fostering of religion is present. . . . The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion. . . .

'A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected . . . ' 403 U.S. at 618-619, 91 S.Ct. 2105 [at 2113-2114], 29 L.Ed.2d 745.

The prophylactic contacts required to ensure that teachers play a strictly nonideological role, the Court held, necessarily give rise to a constitutionally intolerable degree of entanglement between church and state. *Id.*, at 619, 91 S.Ct. 2105 [at 2114], 29 L.Ed.2d 745. The same excessive entanglement would be required for Pennsylvania to be 'certain,' as it must be, that Act 194 personnel do not advance the religious mission of the church-related schools in which they serve. *Public [1090] Funds for Public Schools v. Marburger*, 358 F.Supp. 29, 40-41, *aff'd.*, 417 U.S. 961, 94 S.Ct. 3163, 41 L.Ed.2d 1134.

That Act 194 authorizes state funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this case for *Earley v. DiCenso* and *Lemon v. Kurtzman*, *supra*. Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.' 403 U.S. at 619, 91 S.Ct. 2105 [at 2114], 29 L.Ed.2d 745. And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious



instruction and the advancement of religious beliefs from his secular educational responsibilities.

The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. Cf. *Lemon v. Kurtzman*, 403 U.S. at 618, 91 S.Ct. 2105 [at 2113], 29 L.Ed.2d 745. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. See *id.*, at 618-619, 91 S.Ct. 2105 [at 2113-2114], 29 L.Ed.2d 745. The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed. (Footnotes omitted) 421 U.S. at 369-372, 95 S.Ct. at 1765-1767.

Additionally, as is clear from the above quotation, the court held the statute violated the entanglement principle because the state would become excessively entangled with the affairs of religion in order to insure that the teachers furnished by the state did not advance the religion of the parochial schools.

Subsequent to *Meek*, citizens and taxpayers of Ohio filed an action against state and local officials challenging the constitutionality, under the Establishment Clause, of an Ohio

statute authorizing a six part program of expenditures that provided various aids to students of nonpublic elementary and secondary schools. Four parts of the program were upheld. *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), involved an appropriation of \$88.8 million for various aids to students of nonpublic schools, 96 percent of whom were enrolled in sectarian schools. The Supreme Court sustained the four parts of the program which: (1) provided for the loan of textbooks; (2) paid for the administration of grading standardized achievement tests; (3) provided speech, hearing and psychological diagnostic services on the premises of the nonpublic schools; and, (4) provided "therapeutic services" away from the private school premises. The court held unconstitutional two parts of the legislation which: (1) provided for the loan to private school students of secular instructional equipment and materials comparable to those used in public schools; and (2) paid the expenses of transporting private school [1091] students on field trips. The court struck down the loan of instructional equipment and materials on the explicit rationale that this provision violated the primary effect principle.

An enlightening and valuable comparison can be drawn between two of the programs which the court sustained: the diagnostic services performed on the premises of the private schools and the therapeutic services performed away from private schools. Concluding that the diagnostic services to be performed on the premises of religious schools did not present a substantial danger of advancing religion, the Court stated:

The reason for considering diagnostic services to be different from teaching or counseling is readily apparent.

First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the non-public



school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

We conclude that providing diagnostic services on the nonpublic school premises will not create an impermissible risk of the fostering of ideological views. It follows that there is no need for excessive surveillance, and there will not be impermissible entanglement. We therefore hold that §§ 3317.06(D) and (F) are constitutional. 433 U.S. at 244, 97 S.Ct. at 2603.

With respect to the provision of therapeutic services to pupils of nonpublic schools, the Court upheld the program, providing that services were performed at sites other than the nonpublic schools. Contrasting the two programs, the Court made this observation:

We recognize that, unlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views. In *Meek* the Court acknowledged the danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction and advance religious beliefs in their activities. But, as discussed in Part V, *supra*, the Court emphasized that this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school. 421 U.S. at 371, 95 S.Ct. 1753 [at

1766], 44 L.Ed.2d 217. See also *Lemon*, 403 U.S., at 618-619, 91 S.Ct. 2105 [at 2113-2114], 29 L.Ed.2d 745. The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise.

The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek*.

The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils.

Accordingly, we hold that providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible [1092] effect of advancing religion. Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state. Sections 3317.06(G), (H), (I), and (K) are constitutional. 433 U.S. at 247-248, 97 S.Ct. at 2605-2606.

[10, 11] After a careful search, and comparing the cases, I conclude that services supplied at public expense may be offered on the premises of religious schools provided that the con-

tact with the child and the link to the educational institution are sufficiently limited so as to diminish any danger that the service-provider, who operates under the subtle pressures of the religious atmosphere will be tempted to advance religious views to the children. The decisions indicate that standardized testing and scoring, as well as diagnostic and psychological services may, indeed, be provided on nonpublic school premises. However, state expenditures violate the effect aspect of the constitutional test if such payments are directed to the provision of instructional services for nonpublic school students on premises of schools having religious affiliations.

The Supreme Court has given prominence in several decisions to the level of education offered at religiously affiliated institutions receiving public funds. First, in *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), *reh. den.*, 404 U.S. 874, 92 S.Ct. 25, 30 L.Ed.2d 120 (1971), the Court, sustained legislation providing public funds for the construction of buildings to be used for secular purposes, emphasized differences between colleges on the one hand and elementary and secondary schools on the other:

The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are

characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students. (Citations and footnotes omitted). 403 U.S. at 685-686.

Two years later, in *Hunt v. McNair*, *supra*, the Supreme Court relied upon *Tilton* in sustaining a legislative system by which a sectarian college was permitted to borrow capital funds at interest rates otherwise available only to the state. *See also*, *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976). Given this distinction, and the fact that the programs *sub judice* are offered at sectarian elementary and secondary schools, the level of scrutiny by which the Court must evaluate the programs is commensurately heightened.

In assessing the instant matter, I observe that the Shared Time and Community Education programs have a number of relevant characteristics in common with the "dual-enrollment" program, which was permanently enjoined by this Court in *Americans United for Separation of Church and State v. Porter*, *supra*. In each of the programs, a lease was the instrument through which the public school district gained access to nonpublic school facilities. One effect, in both cases, permitted nonpublic school students to attend public school classes without ever leaving the nonpublic school or mixing [1093] with public school students. A second common feature is the complete identity of the student body in the "public school" classes and the nonpublic schools. As in *Porter*, all of the students in Shared Time and Community Education classes are full-time students of the nonpublic schools. Since there are, in fact, no public school students participating in the instant programs, the nonpublic schools are permitted to retain their private religious character. Certainly, there are other similarities and differences between the two programs. However, these two features are significant in that they demonstrate that each of



the programs has a constitutionally impermissible effect. *Accord*, *Americans United For Separation of Church and State v. Oakey*, 337 F. Supp. 545 (D. Vt. 1972); *Americans United For Separation of Church and State v. Paire*, 359 F.Supp. 505 (D. NH. 1973); *Fisher v. Clackamas County School District*, 13 Or. App. 56, 507 P.2d 839 (1973); *Americans United for Separation of Church and State v. Beechwood Independent School District*, 369 F.Supp. 1059 (E.D. Ky. 1974).

[12, 13] In assessing whether the Shared Time program has a sufficiently secular effect, the Court must determine, among other things, whether the class benefited is sufficiently broad. Even when genuinely motivated by an undeniably secular purpose, government must not act so as to support a narrow group of religiously segregated beneficiaries. The challenged programs impact upon a very narrow religious class of beneficiaries. The narrowness of the benefited class was a crucial factor in *Nyquist* in striking down the tax relief program for parents of nonpublic school children where parochial school children composed over 80 percent of the benefited class. Conversely, the breadth of this class has also been a determinative factor in sustaining aid to nonpublic school pupils, particularly at the university level. *Wolman v. Walter*, *supra*. The Grand Rapids program, by distinction, directly benefits nonpublic school students, and hence nonpublic schools, while at the same time it excludes members of the public at large. Whereas public school students are assembled at the public facility nearest to their residence, students in religious schools are assembled on the basis of religion without any consideration of residence or school district boundaries. With respect to the exclusion of public from Shared Time classes a mere statement in the lease that such programs are open to all, does not, as the evidence plainly demonstrated, make the program open to the public.

[14] Despite Defendants' assertions to the contrary, the Court finds that beneficiaries are wholly designated on the basis of religion and, as will be discussed more fully below, the programs as currently implemented also carry with them the destructive potential for political divisiveness. Many of the Shared Time instructors previously taught at the same nonpublic school to which they have now been assigned as public employees. In the Community Education program, the vast majority of instructors are also employed full time by the same nonpublic school. Without questioning the good faith and integrity of the teachers, this Court cannot ignore the potential for advancing religious doctrine under these conditions. Notwithstanding these concerns, a larger problem lies in the fact that challenged courses are conducted in the sectarian atmosphere of the religious schools. As specifically addressed in *Nyquist*, there is a deeper concern that the atmosphere of the schools, rather than actions of the instructors, will have an effect which advances religion. When courses are offered within the abdomen of a sectarian institution to students who are brought together for a religious mission, there is a distinctly impermissible constitutional effect.<sup>[11]</sup>

Another glaring nonsecular effect of the programs is that financial responsibility for [1094] teaching Physical Education, Art, Music and all of the other available course offerings has been transferred from the private religious schools to the taxpayers. By entering into a legalistic agreement with the parochial schools, the public schools have gained more than access

[11]

See also, Justice Powell's concurring Opinion in *Wheeler v. Barrera*, 417 U.S. 402, 428, 94 S.Ct. 2274, 2288, 41 L.Ed.2d 159 (1974), addressing the implementation of the Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. §§ 241a *et seq*, where he said:

I would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools.



to facilities. They have conferred substantial financial benefits upon those religious institutions by employing and paying from tax funds the numerous instructors who teach subjects in the leased classrooms. Without any change in the character of the student body or infusion of any students from other schools, the programs have undeniably rendered direct benefits, both financial and otherwise, to the sectarian institutions. Such an effect is clearly irreconcilable with the dictates of the Establishment Clause.

The relative merit and benefits of the Shared Time and Community Education programs are not issues before the Court. The issue here is whether this composition of students and teachers, when combined in the sectarian atmosphere of a religious school, fosters an impermissible effect under the Establishment Clause. For the reasons discussed herein, I hold that the challenged programs do violate the First Amendment.

### C. The Entanglement Problems

[15] Created out of a desire to minimize government intrusion into the realm of religion, the third aspect of the constitutional standard requires that the program under scrutiny must avoid "an excessive government entanglement with religion." *Walz v. Tax Commissioner, supra*, 397 U.S. at 674, 90 S.Ct. at 1414. Generally, excessiveness is a question of degree and is often referred to as "administrative entanglement." Some governmental activity that does not have an impermissible religious effect may nevertheless be unconstitutional, if in order to avoid the religious effect government must enter into an arrangement which requires it to monitor the activity. *Lemon v. Kurtzman, supra*; *Levitt v. Committee for Public Education, supra*.

An additional and somewhat different form of entanglement, "political entanglement", was first enunciated in *Lemon v. Kurtzman, supra*:<sup>[12]</sup>

A broader base of entanglement of yet a different character is presented by the divisive *political potential* of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the *usual campaign techniques* to prevail. Candidates will be forced to declare and *voters to choose*. It would be unrealistic to ignore the fact that many [1095] people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of

#### [12]

Some of the lawyers have described this standard as a fourth and newer standard. However, it is actually included within the entanglement standard, and, indeed, was included in the *Lemon* opinion. I choose to discuss it before discussing administrative entanglement, since for me, at least, it poses the fundamental problem: must the government intrude into private religious affairs, whether the churches care or not? One could argue that the church schools are compromising the basis of their existence in their close relationship with the government, and in permitting that government to provide a portion of the educational programs to their schools. Such an issue is, of course, not before me. The issue is whether the Establishment Clause prohibits this relationship even though private schools agree to it.

our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was to protect. 403 U.S. at 622, 91 S.Ct. at 2115-2116. (Emphasis supplied).

[16] I have already decided that the educational programs at issue benefit narrow groups of citizens on the basis of religion. Because Grand Rapids is a religiously pluralistic community, there are already religious divisions in that city. In preparation for the March, 1980, school millage campaign, the Grand Rapids Board of Education published *Citizens Handbook Millage '80*, which was distributed as a factual source book to campaign workers. In that booklet the Board of Education has made a purposeful effort to influence favorably the taxpayers sending children to nonpublic schools on the basis of benefits conferred under the programs challenged herein. In attempting to align voters with its cause, the School Board has unquestionably fostered political division along religious lines in disregard of the warnings in *Lemon*. The next Grand Rapids school millage election is scheduled for 1983. Obviously the *potential* for political division on the issue of financial aid to religious schools appears imminent. *Lemon* clearly addresses the problem confronting the parties here:

The *potential* for political divisiveness related to religious beliefs and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. The Rhode Island District Court found that the parochial school system's 'monumental and deepening financial crisis' would 'inescapably' require larger annual appropriations subsidizing greater percentages of the salaries of lay teachers. Although no facts have been developed in this respect in the Pennsylvania case, it appears that such pressures for expanding aid have already required the state legislature to include a portion of the

state revenues from cigarette taxes in the program. 403 U.S. at 623-624, 91 S.Ct. at 2116-2117. (Emphasis supplied).

One can scarcely criticize the Defendant School District. Given the realities of the national and state economies (not to mention the curious Michigan formula for financially supporting its public schools), extra voted millage is the *only* way a school district can keep its school doors open. Obviously, appealing to the voters and importuning them to favorably consider a new millage proposal requires the District to utilize all the persuasion, and all the public relations hyperbole, that it possesses. It is sensible, then, for the district to appeal to those voters who have opted to send their children to private schools. While sensible, it also is a political appeal to the voting community. As such, it invites opposition, as do all political propositions.

In oral argument counsel for Defendant School District urged this Court to consider the fact that, although a potential for political divisiveness might exist, such a division had not occurred. Such an argument ignores the existence of the instant suit and the affidavits of four of the Plaintiffs. Other divisiveness occasioned by the *Citizens Handbook* is only surmise, and such speculation lies without the purview of this Court. Within the ambit of my decision, however, is the inescapable conclusion that such political appeal, as contained in the handbook, creates the *potential* for political division. Such a tendency has long been constitutionally disfavored.

Indeed, the potential for political divisiveness is altogether too evident. The School District "campaigned" (a political ingredient as ancient as politics itself) for a successful millage in 1980, and included the [1096] appeal to the nonpublic school parents. Some candidates for the school board advertised their approval for the millage, including approval of the inclusion of



the Shared Time and Community Education programs. This is not a potential for political division but rather historical fact. Voters may also disagree on the issue of the "profitability" of the suspect program. Similarly, the spectre of Board candidates dividing voters over the program haunts the political process.

The potential problems include the 1983 millage election and whether the Board will again appeal to nonpublic school parents. Should one of the Plaintiffs be a school board candidate, that potential becomes a reality.

Defendants further argue that I should ignore the potential for political divisiveness notwithstanding *Lemon*, *Roemer*, and *Nyquist*, because in the instant case the programs have existed for some time without such division. In summary, they argue that potential can be ignored when the track is smooth. Such an argument applies only to effect, however, and not to the clear teaching of *Lemon* and its progeny with respect to political divisiveness. Indeed, it might be argued that political interference with religion, and its corollary, was the touchstone of the drafters' reasoning in the First Amendment.

Periodic appropriations battles and expanded budgetary demands heighten the threat of political divisiveness resulting from the programs at issue. Therefore, I conclude that both programs create an untenable potential for political division along sectarian lines. While "the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decision of the Court, it is certainly a 'warning signal' not to be ignored." *Committee for Public Education v. Nyquist*, *supra* at 413 U.S. at 794, 93 S.Ct. at 2976.

[17] By contrast, forbidden administrative entanglement normally takes the form of excessive government surveillance

of religious institutions and personnel. This type of administrative entanglement typically involves the government in policing the expenditures of public monies to insure, as the Establishment Clause requires, that such monies are expended only for secular purposes. An evaluation of administrative entanglement requires me to consider three factors: "(1) the character and purposes of the benefited institutions, (2) the nature of the aid provided, and (3) the resulting relationship between the state and the religious authority." *Roemer v. Maryland Public Works Board*, 426 U.S. at 748, 96 S.Ct. at 2345.

[18, 19] As to the character and purpose of the benefited institutions, I have previously concluded that the aided schools, both elementary and secondary, are characterized by substantial religious activity having the primary purpose of advancing religious doctrines. Most, if not all, of the nonpublic schools were located on or near parish churches. The great majority of instructors at those schools are members of the religious faith with which the school is affiliated. This is also true for the great majority of students, all of whom are at an impressionable age. I conclude without hesitation that the purpose of these schools is to advance their particular religions.<sup>[13]</sup>

Having previously discussed at length the nature of the aid provided, the Court now examines resulting relationship between the state and the religious institutions. The Grand Rapids Public Schools utilized a lease to gain access to facilities within the religious schools participating in the Shared Time and Community Education programs. The director of the Shared Time program testified that he contacts the non-

[13]

That they are pervasively sectarian can be gleaned from the recitation outlined earlier in this Opinion. The fact that they are pervasively sectarian, does not mean that there is a *per se* First Amendment intrusion any more than not being pervasively sectarian means no intrusion has occurred. It only requires that a court scrutinize carefully the nature of the relationship between the state and such schools.



public schools that participate in the program to determine which classrooms can be leased. Subsequently, the director visits the nonpublic school building to confer with the Shared Time instructor as to whether the facilities provided are suitable. Pursuant to this arrangement, during the 1981-82 school year rental payments in excess of \$200,000 were received by participating nonpublic schools.

I have previously addressed the virtual identity of the student body and the teaching staff. The record also discloses that no evidence was offered by Defendants that any of the participating students come from public schools. As a matter of fact, one witness admitted that a public school student would not be permitted to enroll in a Shared Time class even though that program was "public." Though Defendants claim the Shared Time program is available to all students, the record is abundantly clear that only nonpublic school students wearing the cloak of a "public school student" can enroll in it.

Sharp focus on administrative entanglement reveals that there is considerable duplication between the teachers and staff of the Shared Time program and the nonpublic schools at which their services are rendered. The evidence abundantly demonstrates that many teachers who are employed by a nonpublic school are also employed by the Grand Rapids Public Schools in the Community Education program at the same school. In other instances teachers, now working as Shared Time instructors were previously employed by the nonpublic school at the same building. Teachers working in the sectarian schools, where religion is an integral part of its very purpose, are bound to the advancement of that purpose. As employees of the Grand Rapids Public Schools, those same teachers must discard any expression of the religious values that are otherwise part of the nonpublic schools' reason for existence. Moreover, they must do this within the same building where the normal curriculum is offered, including

religion. In essence, nonpublic school teachers employed on a part-time basis by the Grand Rapids Public Schools are required to reverse roles during different times of the day.

The case of Kenneth Zandee is illustrative of the dilemma. Prior to 1977, Zandee was a full-time physical education teacher at Christian High School. In 1977, he entered the employ of the Grand Rapids Public Schools Shared Time program as a full-time physical education teacher assigned to teach at Christian High School. Zandee, thus, returned to Christian High School, this time as a public school employee paid from tax money, to teach the very same subject to the very same Christian High School students. Clearly, during this transition the Grand Rapids Public School had assumed the function of providing physical education courses to the students at Christian High School. To complicate matters further, Zandee also teaches a course called Body Mechanics in the "zero hour" Community Education program conducted at school. Finally, Zandee is also employed by Christian High School, as basketball coach, in both his and the school's private capacities.<sup>[14]</sup>

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[14]

The separation of church and state requirements imposed on Zandee are bizarre to say the least, and unfair to him in the extreme. His whole life has been devoted to his religion and to education within the tenets of his faith. He was educated through college within schools provided by his church. He, as a candid and fair witness, frankly admitted his adherence to the Basis (see earlier discussion) because his children attend the same nonpublic school system in which he taught (still teaches?), and in which he, himself, was educated. That Basis to which he earnestly and admiringly was required to submit, as a condition precedent for the education of his own children, must, somehow, be ignored by him during the working day.

Worse, he is the private school basketball coach, utilizing the private school gymnasium for practice and home games. He conducts the suspect programs in the very same gymnasium although they are labeled "public" by the requirements of the Shared Time and the Community Education programs. Ironically, he testified that the "public classroom"

[20] The case of Mr. Zandee demonstrates the interrelationships which have of [1098] necessity developed between the government and the nonpublic institutions. Likewise, the case of Zandee, and others similarly situated, portrays the real need for monitoring to insure that religious views are not advanced in Shared Time or Community Education programs. Without such monitoring the programs run the risk of enhancing religious views. If the courses are monitored, the programs are still infirm in that an excessive administrative entanglement is necessitated. In either case, the same ultimate result applies and the programs cannot be sustained.

[21] The Court's finding that the programs breed an excessive administrative entanglement is bolstered by the procedures through which classes and schedules are coordinated for the programs. In order to coordinate the scheduling of 1,500 classes offered by 470 teachers, the Grand Rapids Public Schools take the following steps: Shared Time and Community Education

placard was on the wall one time, at least, when two religious schools were competing on the hardwood. One wonders what the players and spectators thought. A rational person might have said: "Who is fooling whom?"

The children, of course, are the greater concern. In his capacity as coach, Mr. Zandee testified that his players pray, as indeed his creed requires him to do. However, when those very same students are in the very same gym during the day, and after he has donned his public school hat, they (student and teacher) are forbidden to pray. These youngsters can scarcely be expected to understand the nuance, and neither do I. I grieve for Mr. Zandee, and his students, who are required to pretend during the day that they are somehow different than they are at night. The state's intrusion on their religious rights, as guaranteed by the other clause of the First Amendment, is onerous.

Mr. Zandee was less than clear in his testimony about what the public school supervisors were looking for when they visited "his" gym and classroom on "many" occasions. If they were there to monitor his secular methods of instruction, there is excessive administrative entanglement. If they were not, the potential for First Amendment violations was excessive, given his peculiar situation.

Either way, Mr. Jefferson's famous "Wall" has crumbled.

course packets are sent to the participating nonpublic schools. In turn, nonpublic schools reply, indicating which classes they wish to offer. The Director of the Shared Time program then contacts the nonpublic schools to determine which classrooms are available. He then confers with the Shared Time teachers to see if the rooms provided are satisfactory. Additionally, because the academic year calendars of the involved schools is not necessarily coterminous, certain adjustments must be made. One reason the calendars are different relates to religious holidays which the nonpublic schools celebrate. Adjusting schedules creates obvious additional administrative entanglement. Upon closer scrutiny the need to intrude becomes greater as does the assault on the First Amendment. Once entanglement becomes necessary, like a runaway horse, it is hard to corral.

Once the class schedules are set, still more forms of entanglement arise. For example, parents wishing to speak with a Shared Time instructor are encouraged to make an appointment through the nonpublic school's administrative office. It is noteworthy that a great number of the schools publish handbooks which comingle Shared Time and Community Education classes and instructors with those offered exclusively by the nonpublic school. No mention is made of the fact that these teachers are public school employees and the classes are public offerings. Instead, the impression is conveyed that the teachers listed are nonpublic school teachers. Likewise, the courses listed convey the impression that they are offerings of the particular nonpublic school. Additional entanglement problems arise with respect to student discipline, attendance and dress code policies.

The trial record reveals that, indeed, there has been intermingling of public and nonpublic personnel, courses and other ma- [1099] terials. It is not unusual for the supervisor of one of the challenged programs to be a teacher, or even the



principal, at one of the participating religious schools. Indeed, teachers now on the public school payroll occupy similar positions as before the inception of the programs, with minimal changes in the identity of students or responsibilities. The Public School District is gradually, but surely, taking over an integral function of these religious schools; namely, providing an education to parochial students. As they are currently implemented, it is not difficult to see that both programs are destined to continue expanding numerically, geographically and, most significantly, in terms of the attendant administrative entanglement. For the above reasons, I am compelled to hold that both the Shared Time and the Community Education programs at issue are constitutionally infirm on the basis that they create an excessive administrative entanglement between government and religion.

The Shared Time and Community Education programs established and implemented by the School District for the City of Grand Rapids, through the use of premises leased from various religious schools, violate the Establishment Clause of the United States Constitution because the programs have the primary effect of advancing religion, and because the programs involve an excessive government entanglement with religion. Plaintiffs are entitled to a Permanent Injunction barring further implementation of the programs at issue and the expenditure of public tax monies.

#### EPILOGUE

During my tour of seven of the schools last Monday, I was most impressed by both public and private school administrators whom I met. Their sincerity, intelligence, and, above all, their dedication to education, and the children they serve convince me that Grand Rapids is, indeed, fortunate. Much of defense counsel's final argument was addressed to the unique quality and spirit of cooperation existing between the public

and private sectors in education and the quality of programing available to all of the children of this community. I agree.

Furthermore, with considerable eloquence and persuasion, he addressed himself to the proposition that, whatever my decision, the nonpublic schools would persevere and would not be forced to close for financial need. Indeed, these schools have long existed in Grand Rapids.

In fact, even before the arguments and the tour, I was not unaware of the outstanding educational opportunities provided by religiously affiliated institutions in this country. Nor was I unaware of the special place that the public schools have been accorded in our American life and history. It is precisely this unique opportunity of choice which mandates that our law, not our sentiments, should chart the distinctions between state and private responsibilities and rights. . . and, hence, preserve those freedoms which we Americans so deeply treasure.

A court of law in this constitutional democracy is legally bound by a set of deeply rooted, near-inviolable principles. Among the foremost are those which can be gleaned from our First Amendment. Our constitutional delegates sought the advancement of religious and secular freedoms alike by diffusing power in order to insure, among other things, competition among religious sects, as contrasted to dominion by any one. To preserve such freedom, judges take an oath, at the outset of their commissions, to preserve and protect our sacred Constitution. Because public schools are the vehicles which transmit basic lessons and ideals of this nation to our young, our courts have guarded against their use as a religious forum.

In the context of this case alone, as in all litigation, one assumes there are "winners" and "losers." In the constitutional context, however, there are no losers when our Con-



stitution enables us to preserve basic freedoms, even when a particular program is found to be in violation.

[1100] Long ago, a French visitor to our young nation, Alexis de Tocqueville, said: "There is hardly a political question in the United States which does not, sooner or later, turn into a judicial one." White, *America in Search of Itself*, Harper and Row; (1982). However he intended this comment, many lament. Indeed, counsel reminded me, during argument, not to exercise the awesome power of injunction lightly. Counsel is correct that injunction is the ultimate power of American justice. White refers to it as the *consultum ultimum*.

While a trial judge ought never to enjoin without the most serious consideration and lengthy contemplation, this power is subject to judicial review. Importantly, the final decision, by whatever court, demonstrates that ours is, indeed, a nation of law. Where freedom is concerned, it must be protected by law, and not by the urgent cry of the majority.

### JUDGMENT

This cause having been tried before the Court sitting without a jury, and the Court having filed its Memorandum Opinion, therein constituting its findings of fact and conclusions of law;

#### IT IS ORDERED AND ADJUDGED:

1. Those programs established and operated by the School District of the City of Grand Rapids, through the use of premises leased from religious nonpublic schools, are declared violative of the Establishment Clause of the First Amendment to the United States Constitution because the entire Shared Time Program, and those portions of the Community Education Program specifically addressed in the Court's Opinion, have the primary effect of advancing religion, and foster an excessive entanglement with religion.

2. The Defendants herein, and each of them, are permanently enjoined from continuing to operate and conduct the above described programs effective this date.

**FILED**  
**JAN 12 1984**

ALEXANDER L. STEVAS.  
CLERK

No. 83-990

**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983**

**THE SCHOOL DISTRICT OF THE CITY OF GRAND  
RAPIDS; PHILLIP RUNKEL, Superintendent of Public  
Instruction of the State of Michigan; STATE BOARD OF  
EDUCATION OF THE STATE OF MICHIGAN; LOREN  
E. MONROE, State Treasurer of the State of Michigan;  
IRMA GARCIA-AGUILAR and SIMON AGUILAR,  
BRUCE and LINDA BYLSMA, ROBERT and PENELOPE  
COMER, CLARENCE and ROSALEE COVERT, SCIPUO  
and JANICE FLOWERS, JOHN and SHIRLEY LEETSMA,**  
**Petitioners,**

**v.**

**PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS;  
PATRICIA DAVIS; FREDERICK L. SCHWASS and  
WALTER BERGMAN,**

**Respondents.**

**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**BRIEF FOR RESPONDENTS**

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Dated: January 12, 1984

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No. 83-990

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEETSMA,

Petitioners,

v.

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,

Respondents.

## BRIEF FOR RESPONDENTS

## OPINIONS AND ORDERS OF THE COURTS BELOW

The September 23, 1983 Opinion of the Sixth Circuit Court of Appeals and the Notice of Entry of Judgment, along with the August 16, 1982 Opinion and Judgment of the District Court, reported in 546 F. Supp. 1071, are in the Appendix to the Joint Petition for Writ of Certiorari filed December 15, 1983. References to that Petition and Appendix will be by page numbers, usually in parentheses.

I.

**CERTIORARI SHOULD BE DENIED BECAUSE THE SEPTEMBER 1983 DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS NOT IN CONFLICT WITH ANY OTHER FEDERAL COURT OF APPEALS, AND IT FOLLOWS A LINE OF CASE AUTHORITY WHICH IS VIRTUALLY UNANIMOUS.**

In affirming Judge Enslen's opinion, the Court of Appeals expressed its reliance upon six decisions of the U. S. Supreme Court. (37a). The most recent of these are: *Wolman v Walter*, 433 U.S. 229 (1977); *Meek v Pittenger*, 421 U.S. 349 (1975); *Committee for Public Education v Nyquist*, 413 U.S. 756 (1973); *Lemon v Kurtzman*, 403 U.S. 602 (1971). These and several other Supreme Court decisions were discussed and analyzed at some length by District Judge Enslen (96a-106a). Respondents especially call attention to the exhaustive analysis of *Lemon*, *Meek* and *Wolman* found at pages 100a-105a.

In practical effect, there is little or no difference between the aid device established by Petitioner Grand Rapids School District and the "purchase of secular services" device in *Lemon*, or the salary supplement device invalidated by this Court in *Earley v DiCenso*, 403 U.S. 602 (1971). The end result is to subsidize with tax dollars the teaching of important parts of the curriculum of sectarian schools. Where, as here, the religious schools receiving such instructional services are

sectarian in the sense that a substantial portion of their functions are subsumed in the religious mission of the institution (36a), there is no way to segregate secular and religious activities, and any government subsidy would constitute impermissible aid to the sectarian institution, in violation of the Establishment Clause.

The particular aid device of Petitioner Grand Rapids School District involved one feature not specifically found in the cited Supreme Court decisions, namely, a lease entered into between the public school district and each of the sectarian schools. The unique feature of this lease is that it does not expressly pertain to any described wing, floor or room in the parochial school but, rather, its impact accompanies the public school teacher into and about the building so that certain rooms are transformed into "public school" classrooms as and when the teacher convenes class there. As each room in this manner becomes a "public school", the students occupying the room become "public school students". The school district requires its teachers to carry and to post signs which identify each such area as a public school classroom. Also, each such classroom is "desanctified" by removing crucifixes, religious symbols, and artifacts, although such objects are permitted to remain in adjoining corridors, surrounding rooms, or other facilities used in connection with the leasehold. (5a). By this fictional lease device, Petitioner claimed to have transformed the students in each sectarian school building into "part-time public school students", thus enabling the school district to apply for and obtain State tax funds based upon the "full-time equivalent" number of students. (4a). As would be expected, this program was popular with the religious institutions which operated sectarian schools in the Grand Rapids area, and it expanded rapidly. (4a).

The lease was determined to be a fictional device to provide the public school district access to the sectarian schools, the

purpose of such access being to confer valuable educational services upon the religious school and its students. (22a) This was made clear by the fact that there were no public school students participating in the program; all students were enrolled full-time in the participating sectarian schools. (22a). This feature of "student body identity" existed in several lower court cases cited by District Judge Enslen. (22a, 23a). See the following:

*Americans United for Separation of Church and State v Porter*, 485 F Supp 432 (WD Mich 1980)

*Americans United for Separation of Church and State v Oakey*, 337 F Supp 545 (D Vt 1972)

*Americans United for Separation of Church and State v Paire*, 359 F Supp 505 (D NH 1973)

*Fisher v Clackamas County School District*, 13 Or App 56, 507 P 2d 839 (1973)

*Americans United for Separation of Church and State v Beechwood School District*, 369 F Supp 1059 (ED Ky 1974)

All of these cases involved lease programs and, upon analysis, all provide support for the decisions in the instant case. This is not to say that the guiding principles are not adequately spelled out in the landmark cases of *Lemon*, *Earley Nyquist*, *Meek*, and *Wolman*, *supra*. Indeed, the 1980 decision in *Porter*, cited immediately above, contains a lengthy discussion and analysis of all of the mentioned Supreme Court cases, and that District Court relied heavily upon them in its decision. Thus, lower courts confronted with lease cases have found the decisions of this Court to be sufficiently explicit as precedents to establish a virtually unanimous line of authority. No additional pronouncement by this Court is needed.

There is only one case which is not in accord with this strong line of authority, that being *Citizens to Advance Public Education v State Superintendent of Public Instruction*, 65 Mich App 168 (1975), 237 NW2d 232, (Leave to appeal denied 397 Mich 854). Even in that case the Court acknowledged in a footnote at page 180 that its decision did not harmonize with the weight of authority.

Where it appears that *all* of the students who benefit from the Shared Time classes are enrolled in the sectarian school for the balance of their courses, it becomes obvious that the program is designed, not as a benefit to children, but to channel taxpayer funds to the *sectarian school*. This important point was highlighted in a case which Petitioners have wrongly cited (12, 13) in support of their position, *State of Nebraska ex rel School District of Hartington v Nebraska State Board of Education*, 188 Neb 1, 195 NW2d 161, cert denied 409 U.S. 921 (1972). The lease program there was upheld by the Nebraska Supreme Court, and certiorari was denied by the United States Supreme Court. The Opinion of Justice Brennan on denial and the dissenting Opinion of Justice Douglas make it clear that "students from both the public and the private school would attend these classes" held in two classrooms leased by Hartington Public School District from the Cedar Catholic High School. Indeed, Justice Brennan specifies the exact number—91 public school and 48 parochial school children. Thus, a good faith, arms-length lease of space in a parochial school was upheld *where the feature of "student body identity" was found not to exist*. Even so, there were strong dissenting opinions filed in both the Nebraska Supreme Court and the U.S. Supreme Court (Justice Douglas).

Also cited by Petitioners at page 13 is *National Coalition for Public Education and Religious Liberty v Harris*, 489 F Supp 1248 (SD NY 1980), appeal dismissed, 449 U.S. 808, rehearing denied, 449 U.S. 1028. This was a Title I case under the



Elementary and Secondary Education Act of 1965. While the aid program there was approved, there are important differences between that case and the instant case on the facts:

1. The schools in *Harris* were not pervasively sectarian, only religiously affiliated. 489 F. Supp at 1263. In such a school, religion does not pervade or permeate the entire program offered in the school, as is the case in the Grand Rapids sectarian schools.
2. The Court found the program produced "minor administrative contacts", but no impermissible administrative entanglement. Page 1269-70.
3. The Court found the program had not generated any divisive political potential. Page 1269-1270.

Summarizing the thrust of the mentioned decisions in this area of Constitutional law, Respondents believe that only one decision, *Citizens to Advance Public Education v State Superintendent of Public Instruction*, *supra*, runs contrary to the strong line of authority which mandates invalidating the instant programs. That case was decided in 1975 by a Michigan intermediate appellate court, not by a State Court of last resort. Subsequent to that decision, there have been two contrary decisions by the Federal District Court for the Western District of Michigan, being *Americans United for Separation of Church and State v Porter*, 485 F Supp 432 (1980), and the instant case decided by Judge Enslen in August 1982 and affirmed by the Sixth Circuit Court of Appeals September 23, 1983.

## II.

### IN ACCUSING THE COURTS BELOW OF A SIMPLISTIC per se, GEOGRAPHIC RULING THAT THE PROGRAM IS UNCONSTITUTIONAL MERELY BECAUSE CONDUCTED IN RELIGIOUS SCHOOLS, PETITIONERS IGNORE THE FINDINGS OF ADMINISTRATIVE, PERSONNEL, AND POLITICAL ENTANGLEMENT BETWEEN CHURCH AND STATE.

Petitioners allege a "flawless" operational history (46a) and cite *State of Nebraska ex rel School District of Hartington v Nebraska State Board of Education*, 188 Neb 1, 195 NW2d 161, cert denied 409 U.S. 921 (1972),<sup>[1]</sup> in characterizing this as just another public school educational program designed to "provide educational opportunities for our nation's youth" (20) and to "reach out to all students in the community" (24). See, however, page 4 of the Petition where they candidly acknowledge that these educational services were designed "to provide nonpublic school children with educational opportunities beyond the basic nonpublic school core curriculum." Throughout all the stages of this case in both Courts below, Petitioner Grand Rapids School District has placed great emphasis upon the process by which nonpublic school children are transformed into "public school students" for purposes of receiving these educational services. But here they openly admit that the programs are designed to benefit children enrolled in *nonpublic* schools. Having in mind that these schools were determined to be pervasively sectarian (36a, 115a), this admission of Petitioner raises the question whether the programs satisfy even the first element of this Court's three-part test, that is, whether they can be said to have a *secular purpose*.

[1]

This case is discussed above in Part I of this Brief. Far from being authority for Petitioners, it provides support for Respondents.

In the process of arranging for the furnishing of these educational services *on the premises of the sectarian schools*, Petitioner has left a trail of entanglement which threatened to bring about a virtual *merger* of the public and nonpublic school systems. See 30A-35a, quoting from District Court Opinion 116a-120a on administrative and personnel entanglement, and 27a-28a, quoting 112a-113a on findings of political divisiveness or political entanglement. The incredible, embarrassing dilemma created by Petitioner for teacher Kenneth Zandee is detailed at 32a, 118a, at which point the Court urges the need for monitoring of classes, and concludes:

Without such monitoring the programs run the risk of enhancing religious views. If the courses are monitored, the programs are still infirm in that an excessive administrative entanglement is necessitated. In either case, the same ultimate result applies and the programs cannot be sustained.

Thus, contrary to Petitioners' claim, the Courts below did not adopt a simplistic per se rule of unconstitutionality based merely upon the place where classes were conducted. First, there was a finding based on "massive testimony and exhibits" that the sectarian schools involved were comparable in extent of religious commitment to those in *Lemon, supra*. (89a). Next, the Court observed the existence of a "student body identity" in identifying the beneficiaries of the program:

Even when genuinely motivated by an undeniably secular purpose, government must not act so as to support a narrow group of religiously segregated beneficiaries. The challenged programs impact upon a very narrow religious class of beneficiaries. The narrowness of the benefited class was a crucial factor in *Nyquist* in striking down the tax relief program for parents of nonpublic school children

where parochial school children composed over 80 percent of the benefited class. (23a, 108a).

In the instant case there was *complete identity* of the student body in the "public school" Shared Time classes and the nonpublic schools (22a, 107a), and "the beneficiaries of the program are wholly designated on the basis of religion". (24a, 109a). At 116a, the District Judge concluded:

Though Defendants claim the Shared Time program is available to all students, the record is abundantly clear that only nonpublic school students wearing the cloak of a "public school student" can enroll in it.

Continuing the analysis under this Court's often-announced three-part test, the Courts below found the programs "have undeniably rendered direct benefits, both *direct* and otherwise, to the sectarian institutions." (24a, 25a, 110a). And, finally, the entanglement noted above was a product of these direct benefits.

These findings and conclusions mandated a holding that the programs conflict with the Establishment Clause of the First Amendment.

The ultimate thrust of this case was the subject of a paragraph near the end of the majority opinion of the Court of Appeals. In part, the Court said:

We recognize, of course, the increasing impact of Supreme Court majority approval of public funding for religiously neutral supplies and services which are provided to all schools, including parochial schools. If, however, what has been adopted by the Grand Rapids School Board were to be added to the list of such approvals, the separa-

tion of church and state will be effectively ended in the field of public education. (40a).

Citizens of this great nation should be constantly reminded that it is not a mere accident of history that we are virtually alone among the countries on earth in offering to all citizens complete freedom of religion. The simple but effective words of the first clause of the first Article of the Bill of Rights command that "Congress shall make no law respecting an establishment of religion" and this has been interpreted to mandate a separation of government from religion:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, *whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the federal Government can, *openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." *Everson v Board of Education*, 330 U.S. 1, (1947). (emphasis added)

The religious strife in Northern Ireland could not occur in our nation, which prohibits government support of religion and guarantees that no person's political rights shall depend in any way upon the religion he professes. The same is true

of many other troubled nations, including Iran, Lebanon and the Philippine Islands, where a union between the government and the dominant religion has reduced dissenters to the role of rebels against the government.

In this nation where more than 250 different religions and denominations co-exist, we have found the key to religious harmony which has eluded all other peoples and nations for more than 2,000 years. And that key consists of those ten magic words comprising the "Establishment Clause".

In order to preserve that religious harmony and prevent the kind of divisiveness described by the Court of Appeals at 26a-29a, we must continue to turn back all attempts by religious groups to use the powers and functions of government for their advantage.

### III.

#### THE INDIVIDUAL PLAINTIFFS (RESPONDENTS HEREIN) HAVE STANDING TO ATTACK THESE EDUCATIONAL PROGRAMS UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

At the conclusion of the eight-day trial in District Court in May 1982, Petitioners raised, for the first time, the issue of standing. (67a). It was briefed and argued, following which Judge Enslen dismissed the organizational Plaintiff, but held that the individual Plaintiffs had standing under *Flast v Cohen*, 392 U.S. 83 (1968), to attack these programs. (67a-70a).

There seems little question that the individual Plaintiffs possess requisite standing, as was candidly acknowledged by Dissenting Judge Krupansky. (62). The problem is one of pleading, as he analyzed it:



Had plaintiffs challenged the constitutionality of these Michigan legislative enactments, they may possibly have invoked tax payer standing under the criteria of *Flast* and *Valley Forge*.

As early as the discovery phase of this case, and later in exhibits offered by Petitioners at trial, the statutory authority for the Shared Time program and state tax funding for it were revealed. The specific statutes are cited and discussed by Judge Enslen (70a-72a), and much of that material came from an exhibit offered by Petitioner State Board of Education as Exhibit SBE-A. Thus, the legislative acts which, according to Dissenting Judge Krupansky, should have been specifically pleaded by Plaintiffs were a part of the evidence produced at or before trial.

Respondents believe Rule 15(b), Federal Rules of Civil Procedure, which allows an amendment at any time in furtherance of justice, was intended to correct this kind of technical deficiency in pleading:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Rule 15(c) provides that such amendment relates back to the date of the original pleading.

#### IV.

#### CONCLUSION AND RELIEF REQUESTED.

Respondents urge that the Writ of Certiorari be denied.

In the alternative, the Writ should be granted for the purpose of summarily affirming the decision of the Sixth Circuit Court of Appeals rendered September 23, 1983.

Respectfully submitted,

Albert R. Dilley /s/  
Albert R. Dilley  
Attorney for Respondents

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Dated: January 12, 1984

**BEST AVAILABLE COPY**

Office - Supreme Court, U.S.  
**FILED**

No. 83-990

**MAY 11 1984**

**IN THE SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1983**

ALEXANDER L. STEVAS  
CLERK

**THE SCHOOL DISTRICT OF THE CITY OF  
GRAND RAPIDS, et al,**

**Petitioners,**

**v.**

**PHYLLIS BALL, et al,**

**Respondents.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**VOLUME I**  
**JOINT APPENDIX**

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JOINT PETITION FOR CERTIORARI FILED

ALEXANDER L. STEVAS, CLERK

**DECEMBER 15, 1983**

**CERTIORARI GRANTED FEBRUARY 27, 1984**

**MAY 11 1984**

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**FILED**

Office - Supreme Court, U.S.



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**CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES**

August 7, 1980	Plaintiffs' Complaint filed with the U.S. District Court for the Western District of Michigan, Southern Division
February 17, 1981	Plaintiffs filed Motion for Preliminary Injunction and Motion for Summary Judgment
March 4, 1981	Defendants Garcia Aguilar, <i>et. al.</i> , filed Motion to Intervene as Party Defendants
March 19, 1981	Order entered granting the proposed Intervenor's Motion to Intervene
June 10, 1981	Stipulation and Order filed removing consideration of the GRPS' Title I programming
August 28, 1981	Hearing on plaintiffs' Motion for Preliminary Injunction and Motion for Summary Judgment
September 2, 1981	Opinion and Order of U.S. District Court entered denying plaintiffs' Motions for Preliminary Injunction and Summary Judgment
May 10-20, 1982	Nonjury trial
June 9, 1982	Judge Gibson recused himself from the case and it was reassigned to Judge Enslen
August 9, 1982	Final Arguments and tour of schools
August 16, 1982	Judge Enslen's Memorandum Opinion and Judgment were entered declaring unconstitutional the challenged programs

August 16, 1982	Order entered dismissing Americans United for Separation of Church and State for lack of standing
August 18, 1982	Defendants filed Motion with District Court to stay Judgment pending appeal
August 19, 1982	Hearing on defendants' stay request; Order entered denying defendants' stay request
August 19, 1982	Order entered under Rule 41(b) dismissing plaintiffs' challenge to defendants' Outdoor Education, Drownproofing and Driver's Education programs
August 19, 1982	Defendants' Notice of Appeal filed with the U.S. Court of Appeals for the Sixth Circuit coupled with an Emergency Application for Stay
September 2, 1982	Order entered by the U.S. Court of Appeals for Sixth Circuit denying defendants-appellants' stay request
September 10, 1982	Defendants-Appellants filed stay request with Justice Sandra Day O'Connor
September 15, 1982	Justice O'Connor denied defendants-appellants' stay request
September 23, 1983	Opinion of the U.S. Court of Appeals for Sixth Circuit
December 15, 1983	Filing of Defendants' Petition for Writ of Certiorari to the United States Court of Appeals for Sixth Circuit
February 27, 1984	Certiorari granted

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN**

---

**AMERICANS UNITED FOR  
SEPARATION OF CHURCH AND  
STATE, a District of Columbia  
Corporation; PHYLLIS BALL,  
KATHERINE PIEPER, GILBERT  
DAVIS, PATRICIA DAVIS,  
FREDERICK L. SCHWASS,  
and WALTER BERGMAN,**  
Plaintiffs,

-vs-

**THE SCHOOL DISTRICT OF  
THE CITY OF GRAND RAPIDS,  
a Municipal Corporation; PHILLIP  
RUNKEL, Superintendent of Public  
Instruction of the State of Michigan;  
STATE BOARD OF EDUCATION  
OF THE STATE OF MICHIGAN;  
LOREN E. MONROE, State  
Treasurer of the State of Michigan,**  
Defendants.

---

File No.  
G80 517 Ca

**COMPLAINT**

Plaintiffs respectfully show unto the Court as follows:



### **I. Jurisdiction**

1. This is a civil action brought by the Plaintiffs for a temporary and permanent injunction against the allocation and use of the funds of the State of Michigan and the School District of the City of Grand Rapids to finance, in whole or in part, instruction in religious schools, and to declare such use violative of the First Amendment to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, U.S. Code, Sections 1331, 1343(3), 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand (\$10,000) Dollars, as more fully appears hereinafter.

### **II. Plaintiffs**

4. Americans United for Separation of Church and State (hereinafter designated Americans United) is an association of persons resident in the State of Michigan and elsewhere throughout the United States having as its objective to defend, maintain and promote religious liberty and the constitutional principle of separation of church and state. In keeping with this objective, Americans United opposes the use of public funds for the support in whole or in part of sectarian schools or other private schools whose policies and practices are intended to advance and indoctrinate religion.

5. Each of the individual Plaintiffs is a citizen of the United States and a resident within said school district and pays income taxes and other taxes to the United States, and to the State of Michigan and the said school district, and each is a qualified, legal voter registered in the City of Grand Rapids, Kent County, Michigan.

### **III. Defendants**

6. Defendant, Phillip Runkel, is State Superintendent of Public Instruction of the State of Michigan and is sued herein in that capacity. He is responsible for the execution of the policies of the State Board of Education.

7. Defendant, Loren E. Monroe, is State Treasurer of the State of Michigan and is sued herein in that capacity. He is the chief fiscal officer of the State of Michigan.

8. Defendant, State Board of Education of the State of Michigan, is a body corporate with general supervisory powers over all public education within the State of Michigan. It is sued herein in that capacity.

9. Defendant School District of the City of Grand Rapids (hereinafter designated School District) is the governmental agency created by the laws of the State of Michigan and is charged with providing public education within its school district boundaries.

### **IV. Factual Allegations**

10. School District is a subdivision of the Government of the State of Michigan deriving its funds from the taxpayers. Public Act No. 269 of 1955.

11. School District has undertaken and is operating a program in which it leases or rents classrooms or portions of buildings which are owned and operated as schools by various nonpublic school associations, including Protestant Christian Associations and the Bishop and/or the Diocese of the Roman Catholic Church. These rented or leased physical facilities are then staffed by teachers employed by and paid by School

District to teach classes in physical education, art, reading, music, and mathematics to students who are enrolled for other classes in the nonpublic school.

12. These classes, which are taught by public school teachers on the premises of the various nonpublic schools, are considered and referred to by Defendant School District as "shared time classes".

13. Said classes were not designed or intended to serve the general public, but were instead intended to serve the student bodies of said nonpublic schools, and do in fact serve only said student bodies.

14. The students taught in the so-called shared time classes are not assigned to these classes by public school authorities but are assigned by nonpublic school authorities.

15. Many of the nonpublic schools involved with School District in the lease program are church-owned, maintain a student body which is largely or entirely segregated according to religion, and are operated for the principal purpose of indoctrinating in the students the religious tenets of that church.

16. Others among said nonpublic schools are owned by Christian School Associations which operate the schools through boards composed of parents and others who design the curriculum to inculcate in the students the religious tenets of the Christian Reformed Church. As a result of the religious orientation of said schools, they have become, and are, segregated on the basis of religion.

17. Furnishing of taxpayer-funded teaching services to such religiously-segregated schools and student bodies on the premises of such religious schools constitutes a significant

benefit to the religious school and to the religious tenets and beliefs of the churches or groups which operate them, in violation of the Establishment of Religion Clause of The First Amendment to the U.S. Constitution.

18. In the school year 1978-79 Defendant School District provided said "shared time" teaching services to a total of 12,479 students enrolled in religion-oriented and other nonpublic elementary and secondary schools. In applying for State tax funds, Defendant School District equated said 12,479 "shared time" students to 1,864 full-time public school students for which it received \$893.56 per student, or a total of \$1,665,595.84.

19. The Superintendent of Public Instruction of the State of Michigan and State Board of Education have approved said "shared time" program for purposes of receiving State taxpayer aid. Likewise, Defendant Loren E. Monroe has paid State tax funds to Defendant School District for said program. Unless enjoined from so doing, said Defendants will continue to authorize payment of tax funds, and will pay same, to Defendant School District for said program which is in violation of the Establishment Clause of the First Amendment.

20. The funds from which State School Aid is derived are general tax revenues of the State of Michigan, including income taxes and sales taxes paid by the individual Plaintiffs and others similarly situated.

21. It is contrary to the religious conscience of each of the Plaintiffs, and is contrary to the purposes for which the organizational Plaintiff was formed, to be forced by operation of the taxing power to contribute to the propagation of Religion in the support of religious schools.



22. In addition to state taxpayer funds, Defendant School District also expends local tax funds and Federal tax funds in providing said educational services at religion-oriented and religiously-affiliated schools, and said tax funds, except for their use in said unconstitutional "shared time" program, would be available for the education of public school students in the public schools of Defendant School District.

### V. Causes of Action

23. On January 23, 1980 this court (U.S. District Court for the Western District of Michigan) rendered a decision in *Americans United for Separation of Church and State v. Porter, et al*, 485 Fed Supp 432, which declared an identical program operated by Traverse City School District to be in violation of the Establishment Clause of the First Amendment.

24. Plaintiffs believe that the "shared time" program operated as aforesaid by Defendant School District with the approval and financial support of other Defendants herein constitutes a "law respecting an establishment of religion" in violation of the First Amendment in that it (a) constitutes governmental financing and subsidizing of schools which are owned and controlled by religious bodies, organized for and engaged in the practice, propagation and teaching of religion, and limit or give preference in admission and employment to persons of particular religious faiths; (b) constitutes governmental action whose purpose and primary effect are to advance religion; (c) gives rise to an excessive governmental involvement in and entanglement with religion, and (d) gives rise to and intensifies political fragmentation and divisiveness on religious lines.

25. The acts and threatened acts of Defendants, under color of law, deprive the individual Plaintiffs and the mem-

bers of the organizational Plaintiff of rights, privileges and immunities guaranteed them by the Constitution of the United States, and more particularly, rights guaranteed them under the First and Fourteenth Amendments to the Constitution of the United States, in that Plaintiffs are being required to pay taxes for the support of religion and religious schools, to aid with public funds religion and the establishment of religion, and to give financial aid to the teaching and dissemination of religious doctrines and beliefs.

26. This action involves a genuine case or controversy between the Plaintiffs and Defendants.

27. The Plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction are granted.

### VI. Prayers For Relief

WHEREFORE, Plaintiffs pray:

(1) For a Judgment declaring the leasing and "shared time" arrangement between School District and the various nonpublic schools, and the payment of state aid funds to School District, to be violative of the Establishment Clause of the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth, and therefore illegal and null and void.

(2) That Defendants and each of them be enjoined from approving or carrying out any program for the expenditure of federal, state, and local tax funds to finance, in whole or in part, the performance of educational services in religious schools during school hours.



(3) That a preliminary injunction pending trial of the issues be granted to the Plaintiffs against the Defendants for the relief set forth herein.

(4) That the Plaintiffs be granted such other and further relief as to the Court may seem just and proper.

Dated: August 4, 1980

Lee Boothby /s/

Lee Boothby  
Attorney for Plaintiffs

1310 St. Joseph Road  
Berrien Springs, Michigan 49103  
Telephone: (616) 471-7787

**ANSWER ON BEHALF OF DEFENDANT  
BOARD OF EDUCATION OF THE GRAND RAPIDS  
PUBLIC SCHOOLS**

Filed December 31, 1980

[Caption Omitted in Printing]

NOW COMES The Board of Education of the Grand Rapids Public Schools (improperly labeled by plaintiffs as "The School District of the City of Grand Rapids"), a defendant herein, by and through its attorneys, Baxter & Hammond, and for its Answer to plaintiffs' Complaint, says as follows:

**I Jurisdiction**

1. Answering paragraph 1 of Count I, this defendant neither admits nor denies the allegations contained within paragraph 1 of Count I of plaintiffs' Complaint for lack of

knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs.

2. Answering paragraph 2 of Count I, this defendant makes no answer to the allegations contained within paragraph 2 of Count I of plaintiffs' Complaint for the reason that said allegations call for a legal conclusion which this defendant is not required to make.

3. Answering paragraph 3 of Count I, this defendant neither admits nor denies the allegations contained within paragraph 3 of Count I of plaintiffs' Complaint for lack of knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs.

**II Plaintiffs**

4. Answering paragraph 4 of Count II, this defendant neither admits nor denies the allegations contained within paragraph 4 of Count II of plaintiffs' Complaint for lack of knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs.

5. Answering paragraph 5 of Count II, this defendant neither admits nor denies the allegations contained within paragraph 5 of Count II of plaintiffs' Complaint for lack of knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs.

**III Defendants**

6. Answering paragraph 6 of Count III, this defendant neither admits nor denies the allegations contained within paragraph 6 of Count III of plaintiffs' Complaint for lack of knowledge or information sufficient to support a belief with

respect thereto, leaving plaintiffs to their proofs, but believe same to be true.

7. Answering paragraph 7 of Count III, this defendant neither admits nor denies the allegations contained within paragraph 7 of Count III of plaintiffs' Complaint for lack of knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs, but believe same to be true.

8. Answering paragraph 8 of Count III, this defendant neither admits nor denies the allegations contained within paragraph 8 of Count III of plaintiffs' Complaint for lack of knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs, but believe same to be true.

9. Answering paragraph 9 of Count III, this defendant admits the allegations contained within paragraph 9 of Count III of plaintiffs' Complaint.

#### IV Factual Allegations

10. Answering paragraph 10 of Count IV, this defendant admits that it is a subdivision of the Government of the State of Michigan deriving its funds from the tax payers, but additionally states with respect to said allegations, that the School Code of 1955, cited by plaintiffs, has been repealed and replaced by the School Code of 1976, which should more appropriately be denominated as Public Act 451 of the Public Acts of 1976, being MCLA 380.1 *et seq.*

11. Answering paragraph 11 of Count IV, this defendant admits that it has undertaken and is operating a program in which it leases or rents class rooms or portions of buildings which are owned and operated as schools by various

nonpublic school associations, and that these rented or leased facilities are then staffed by teachers employed by and paid by the school district to teach classes therein, and that such classes consist in part, at least, of physical education, art, music, reading (on ancillary, remedial and/or enrichment basis) and mathematics (on an ancillary, remedial and/or enrichment basis), however, with respect to any remaining allegations, this defendant neither admits nor denies same, lacking sufficient knowledge or information upon which to support a belief with respect thereto, leaving plaintiffs to their proofs.

12. Answering paragraph 12 of Count IV, this defendant admits the allegations contained within paragraph 12 of Count IV, of plaintiffs' Complaint.

13. Answering paragraph 13 of Count IV, this defendant denies the allegations contained within paragraph 13 of Count IV of plaintiffs' Complaint.

14. Answering paragraph 14 of Count IV, this defendant denies the allegations contained within paragraph 14 of Count IV of plaintiffs' Complaint.

15. Answering paragraph 15 of Count IV, this defendant admits, on information and belief, that many of the nonpublic schools involved with the school district in the lease program are church owned and/or affiliated, however, with respect to any remaining allegations, this defendant neither admits nor denies same lacking sufficient knowledge or information upon which to support a belief with respect thereto, leaving plaintiffs to their proofs.

16. Answering paragraph 16 of Count IV, this defendant admits, on information and belief, that other nonpublic schools involved in the lease program are or may be operated by



boards composed of parents and others, however, with respect to the remaining allegations contained within paragraph 16 of Count IV of plaintiffs' Complaint, this defendant neither admits nor denies same, lacking sufficient knowledge or information to support a belief with respect thereto, leaving plaintiffs to their proofs.

17. Answering paragraph 17 of Count IV, this defendant denies the allegations contained within paragraph 17 of Count IV of plaintiffs' Complaint for the reason that said allegations are untrue, and further states, that the "services" so noted are designed to constitute a significant benefit to the children of the school district, as a whole.

18. Answering paragraph 18 of Count IV, this defendant admits that the numerical information so set forth, is approximately, plus or minus, correct, and further states in response thereto, that a more definitive answer thereto would require extensive research in light of the peculiarities and particularities which apply to student count information, but it nonetheless believes that the figures may be approximately correct.

19. Answering paragraph 19 of Count IV, this defendant neither admits nor denies the allegations contained within paragraph 19 of Count IV of plaintiffs' Complaint for lack of knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs.

20. Answering paragraph 20 of Count IV, this defendant, on information and belief, admits the allegations set forth in paragraph 20 of Count IV of plaintiffs' Complaint.

21. Answering paragraph 21 of Count IV, this defendant, neither admits nor denies the allegations contained within paragraph 21 of Count IV of plaintiffs' Complaint for lack of knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs.

22. Answering paragraph 22 of Count IV, this defendant admits the use of local tax funds and federal tax funds in providing said educational services, and neither admits nor denies the remaining allegations for lack of knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs.

## V. Causes of Action

23. Answering paragraph 23 of Count V, this defendant admits that the United States District Court for the Western District of Michigan has rendered a decision in the case cited by plaintiff, however, defendant specifically denies that any of the programs herein involved are in any way "identical" with the program operated by the Traverse City School District.

24. Answering paragraph 24 of Count V, this defendant neither admits nor denies any of the allegations concerning plaintiffs' beliefs, lacking sufficient knowledge or information to support a response with respect thereto, leaving plaintiffs to their proofs, however, with respect to any remaining allegations regarding the "establishment of religion", this defendant specifically denies same, for the reason that said allegations are wholly and completely untrue.

25. Answering paragraph 25 of Count V, this defendant denies the allegations contained within paragraph 25 of Count V of plaintiffs' Complaint.

26. Answering paragraph 26 of Count V, this defendant neither admits nor denies the allegations contained within paragraph 26 of Count V of plaintiffs' Complaint for lack of knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs.



27. Answering paragraph 27 of Count V, this defendant neither admits nor denies the allegations contained within paragraph 27 of Count V of plaintiffs' Complaint for lack of knowledge or information sufficient to support a belief with respect thereto, leaving plaintiffs to their proofs.

**VI. Prayers For Relief**

WHEREFORE, this defendant, with respect to each of the subparts set forth under Count VI, denies that plaintiffs are entitled to a judgment or injunction of any kind whatsoever, and prays for a judgment of no cause for action, together with its costs and attorney fees to be taxed.

DATED: 12/31 1980.

**Proof of Service**

STATE OF MICHIGAN }  
COUNTY OF KENT } ss.

Pat Farkas, being first duly sworn, deposes and says that she is a secretary in the employ of the law firm of Baxter & Hammond, attorneys for defendant, The School District of the City of Grand Rapids herein, and she served true copies of the foregoing Answer on Behalf of Defendant Board of Education of the Grand Rapids Public Schools, and Additional and Affirmative Defenses on:

Mr. Lee Boothby  
Attorney at Law  
1310 St. Joseph Road  
Berrien Springs, MI 49103

Mr. Gerald F. Young  
Assistant Attorney General  
750 Law Building  
525 West Ottawa Street  
Lansing, MI 48913

by placing same in sealed envelopes addressed as above-indicated and depositing same in the United States mail with first-class postage fully prepaid thereon, on the 31st day of December, 1980.

Pat Farkas /s/

Pat Farkas

Subscribed and sworn to before me  
this 31st day of December, 1980.

Notary Public, Kent County, MI  
My Commission Expires: 7-18-82

**ANSWER OF DEFENDANTS RUNKEL, ET AL**

Filed January 7, 1981

[Caption Omitted in Printing]

NOW COMES defendants Phillip Runkel, Superintendent of Public Instruction of the State of Michigan, State Board of Education of the State of Michigan, and Loren E. Monroe, State Treasurer of the State of Michigan, sometimes referred to herein as defendants Runkel, et al, by their attorneys, Frank J. Kelley, Attorney General of the State of Michigan, and Gerald F. Young and Paul J. Zimmer, Assistant Attorneys General, and make their answer to plaintiffs' complaint, respectfully representing to this Court as follows:

### **I. Jurisdiction**

1. Defendants Runkel, et al, lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 1 of plaintiffs' complaint and leave plaintiffs to their proofs.

2. The allegations contained in paragraph 2 of plaintiffs' complaint are conclusions of law requiring no answer.

3. Defendants Runkel, et al, lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 3 of plaintiffs' complaint and leave plaintiffs to their proofs.

### **II. Plaintiffs**

4. Defendants Runkel, et al, lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 4 of plaintiffs' complaint and leave plaintiffs to their proofs.

5. Defendants Runkel, et al, lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 5 of plaintiffs' complaint and leave plaintiffs to their proofs.

### **III. Defendants**

6. Defendants Runkel, et al, admit the allegations contained in paragraph 6 of plaintiffs' complaint

7. Defendants Runkel, et al, admit the allegations contained in paragraph 7 of plaintiffs' complaint.

8. Defendants Runkel, et al, admit the allegations contained in paragraph 8 of plaintiffs' complaint, except that defendants Runkel, et al, deny that defendant, State Board of Education, has any general power of supervision over public institutions of higher education granting baccalaureate degrees, with the exception of planning and coordinating.

9. Defendants Runkel, et al, admit the allegations contained in paragraph 9 of plaintiffs' complaint.

### **IV. Factual Allegations**

10. Defendants Runkel, et al, admit the allegations contained in paragraph 10 of plaintiffs' complaint except that such defendants affirmatively assert that 1955 PA 269 has been repealed and replaced by 1976 PA 451.

11. Defendants Runkel, et al, admit that defendant School District has undertaken and is operating a program in which it leases or rents class rooms or portions of buildings which are owned and operated as schools by various nonpublic school associations, and that these rented or leased facilities are then staffed by teachers employed by and paid by the school district to teach classes therein, and that such classes consist in part, at least, of physical education, art, music, reading (on ancillary, remedial and/or enrichment basis) and mathematics (on ancillary, remedial and/or enrichment basis), however, with respect to any remaining allegations, these defendants neither admit nor deny same, lacking sufficient knowledge or information upon which to form a belief with respect thereto, leaving plaintiffs to their proofs.

12. Defendants Runkel, et al, admit the allegations contained in paragraph 12 of plaintiffs' complaint.

13. Defendants Runkel, et al, deny the allegations contained in paragraph 13 of plaintiffs' complaint.

14. Defendants Runkel, et al, deny the allegations contained in paragraph 14 of plaintiffs' complaint.

15. Defendants Runkel, et al, admit, on information and belief, that many of the nonpublic schools involved with the School District in the lease program are church owned and/or affiliated, however, with respect to any remaining allegations, these defendants neither admit nor deny same lacking sufficient knowledge or information upon which to form a belief with respect thereto, leaving plaintiffs to their proofs.

16. Defendants Runkel, et al, admit, on information and belief, that other nonpublic schools involved in the lease program are or may be operated by boards composed of parents and others, however, with respect to the remaining allegations contained within paragraph 16 of plaintiffs' Complaint, these defendants neither admit nor deny same, lacking sufficient knowledge or information to form a belief with respect thereto, leaving plaintiffs to their proofs.

17. Defendants Runkel, et al, deny the allegations contained within paragraph 17 of plaintiffs' Complaint for the reason that said allegations are untrue, and further state, that the "services" so noted are designed to constitute a significant benefit to the children of the school district, as a whole.

18. Defendants Runkel, et al, admit that the numerical information so set forth, is approximately, plus or minus, correct, and further state in response thereto, that a more definitive answer thereto would require extensive research in light of the peculiarities and particularities which apply to student count information, but they nonetheless believe that the figures may be approximately correct.

19. Defendants Runkel, et al, admit the allegations contained in the first two sentences of paragraph 19 of plaintiffs' complaint and affirmatively assert that they have a duty to approve and make the payment of state aid funds to the defendant School District for public school pupils in part-time attendance in public school premises leased by the School District from nonpublic schools, pursuant to *Traverse City School District v Attorney General*, 384 Mich 390 (1971) and *Citizens to Advance Public Education v State Superintendent of Public Instruction*, 65 Mich App 168 (1975). Defendants Runkel, et al, admit the factual allegations contained in the last sentence of paragraph 19 of plaintiffs' complaint and deny the erroneous conclusion of law contained therein concerning alleged violation of the Establishment Clause.

20. Defendants Runkel, et al, admit the allegations contained in paragraph 20 of plaintiffs' complaint.

21. Defendants Runkel, et al, lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 21 of plaintiffs' complaint and leave plaintiffs to their proofs.

22. Defendants Runkel, et al, admit the use of local tax funds and federal tax funds in providing said educational services, and neither admit nor deny the remaining allegations for lack of knowledge or information sufficient to form a belief with respect thereto, leaving plaintiffs to their proofs.

## V. Causes of Action

23. Defendants Runkel, et al, admit that the United States District Court for the Western District of Michigan has rendered a decision in the case cited by plaintiff, however, defendants specifically deny that any of the programs herein involved are in any way "identical" with the program operated by the Traverse City School District.



24. Defendants Runkel, et al deny the factual allegations and erroneous conclusions of law contained in paragraph 24 of plaintiffs' complaint.

25. Defendants Runkel, et al, deny the factual allegations and erroneous conclusions of law contained in paragraph 25 of plaintiffs' complaint.

26. Defendants Runkel, et al, neither admit nor deny the allegations contained within paragraph 26 of plaintiffs' Complaint for lack of knowledge or information sufficient to form a belief with respect thereto, leaving plaintiffs to their proofs.

27. Defendants Runkel, et al, neither admit nor deny the allegations contained within paragraph 27 of plaintiffs' Complaint for lack of knowledge or information sufficient to form a belief with respect thereto, leaving plaintiffs to their proofs.

WHEREFORE, defendants Runkel, et al, respectfully request this court to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted,

FRANK J. KELLEY  
Attorney General

Gerald F. Young /s/

Gerald F. Young

Paul J. Zimmer

Assistant Attorneys General  
Attorneys for Defendants Runkel,  
et al

750 Law Building  
525 West Ottawa Street  
Lansing, MI 48913

### **Additional and Affirmative Defenses**

NOW COME defendants Phillip Runkel, Superintendent of Public Instruction of the State of Michigan, State Board of Education of the State of Michigan, and Loren E. Monroe, State Treasurer of the State of Michigan, sometimes referred to herein as defendants Runkel, et al, by their attorneys, Frank J. Kelley, Attorney General of the State of Michigan, and Gerald F. Young and Paul J. Zimmer, Assistant Attorneys General and for their Additional and Affirmative Defenses, allege and say:

1. That plaintiffs' Complaint either in whole or in part, fails to state a claim upon which relief can be granted.

2. That some or all of the plaintiffs involved herein, do not or may not have standing to assert the claims now made respecting these defendants.

3. That these defendants reserve the right to plead other and additional affirmative defenses pending the conclusion of its discovery proceedings.

Dated: January 7, 1981

### **ANSWER OF INTERVENOR DEFENDANTS GARCIA-AGUILAR, ET AL**

Filed March 3, 1981

[Caption Omitted in Printing]

### **I. Jurisdiction**

1. Intervenor Defendants lack sufficient information to form a belief as to the truth of the allegations contained in

paragraph 1 of Plaintiffs' Complaint and leave Plaintiffs to their proofs.

2. The allegations contained in paragraph 2 of Plaintiffs' Complaint are conclusions of law requiring no answer.

3. Intervenor Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 3 of Plaintiffs' Complaint and leave Plaintiffs to their proofs.

## **II. Plaintiffs**

4. Intervenor Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 4 of Plaintiffs' Complaint and leave Plaintiffs to their proofs.

5. Intervenor Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 5 of Plaintiffs' Complaint and leave Plaintiffs to their proofs.

## **III. Defendants**

6. The allegations contained in Paragraph 6 do not pertain to Intervenor Defendants and require no answer.

7. The allegations contained in Paragraph 7 do not pertain to Intervenor Defendants and require no answer.

8. The allegations contained in Paragraph 8 do not pertain to Intervenor Defendants and require no answer.

9. The allegations contained in Paragraph 9 do not pertain to Intervenor Defendants and require no answer.

## **IV. Factual Allegations**

10. The allegations contained in Paragraph 10 do not pertain to Intervenor Defendants and require no answer.

11. Intervenor Defendants lack personal knowledge and information as to the allegations contained in Paragraph 11 sufficient to form a belief as to the truth thereof except that Student Intervenor do attend public school classes conducted by public school teachers in classrooms located in their respective non-public schools of attendance.

12. Intervenor Defendants lack sufficient information to form a belief as to the truth of the allegations in paragraph 12 and leave Plaintiffs to their proofs.

13. The allegations contained in Paragraph 13 are denied by Intervenor Defendants.

14. The allegations contained in Paragraph 14 are denied by Intervenor Defendants.

15. Intervenor Defendants Runkel admit that many of the non-public schools involved with the School District in the lease program are church-owned or religiously affiliated; regarding any remaining allegations, Intervenor Defendants neither admit nor deny same having insufficient information upon which to form a belief with respect thereto, leaving Plaintiffs to their proofs. Intervenor Defendants, however, deny that the non-public schools are segregated according to religion.

16. Intervenor Defendants admit that some non-public schools involved in the lease program are operated by boards composed of parents and others, however, as to the remaining

allegations contained within paragraph 16, the same are denied.

17. Intervenor Defendants deny the allegations contained within paragraph 17 of Plaintiffs' Complaint for the reason that said allegations are not true and that the "services" referred to are educational courses provided to Intervenor Students and others of like circumstances to assist them in overcoming personal educational handicaps and to meet their individual secular educational needs thereby providing a significant secular educational benefit to each child in attendance at such public school classes.

18. The allegations contained in paragraph 18 do not pertain to Intervenor Defendants and require no answer.

19. The allegations contained in paragraph 19 do not pertain to Intervenor Defendants and require no answer. Intervenor Defendants deny Plaintiffs' erroneous conclusion of law that the provision by the School District of secular educational classes to Intervenor Students, who are residents and children of resident taxpayers and citizens, constitutes a violation of the Constitution.

20. Intervenor Defendants are without sufficient information to form a belief as to the truth of the allegations contained in paragraph 20 and leave Plaintiffs to their proofs.

21. Intervenor Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 21 of Plaintiffs' Complaint and leave Plaintiffs to their proofs.

22. Intervenor Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 22 of Plaintiffs' Complaint and leave Plaintiffs to their proofs.

## V. Causes of Action

23. Intervenor Defendants admit that the United States District Court for the Western District of Michigan rendered a decision in the case cited by Plaintiff, however, Intervenor Defendants, on information and belief, deny that the program herein at issue is "identical" with the program operated by the Traverse City School District.

24. Intervenor Defendants deny the factual allegations and erroneous conclusions of law contained in paragraph 24 of Plaintiffs' Complaint.

25. Intervenor Defendants deny the factual allegations and erroneous conclusions of law contained in paragraph 25 of Plaintiffs' Complaint.

26. Intervenor Defendants lack sufficient knowledge to form a belief as to the truth of the allegations contained within paragraph 26 of Plaintiffs' Complaint and leave Plaintiffs to their proofs thereon.

27. Intervenor Defendants neither admit nor deny the allegations contained within paragraph 27 of Plaintiffs' Complaint for lack of knowledge or information sufficient to form a belief with respect thereto, leaving Plaintiffs to their proofs.

## VI. Prayers For Relief

WHEREFORE, Intervenor Defendants deny that Plaintiffs are entitled to a Judgment or Injunction of any kind and request this Court to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted.



### **First Defense**

28. The Complaint fails to state a claim upon which relief can be granted.

### **Second Defense**

29. Granting of the relief prayed for by Plaintiffs would deprive the Student Intervenors of their right to attend a public educational facility in which to comply with the compulsory attendance laws and in which to receive education to which a citizen is entitled. These deprivations would deny to the Student Intervenors due process of law contrary to the requirements of the Fourteenth Amendment to the Constitution of the United States.

### **Third Defense**

30. Granting of the relief prayed for by the Plaintiff would arbitrarily classify the Student Intervenors, so as to deny them their fundamental right to receive an education, contrary to the requirements of the Equal Protection Clause of the Constitution of the United States.

### **Fourth Defense**

31. Granting of the relief prayed for by the Plaintiffs would deprive the Parent Intervenors of their right to have their children attend a public educational facility for the support of which the Parent Intervenors have paid school taxes and which their children, the Student Intervenors herein, attend by permission of the public school district. Such a deprivation would constitute a denial to the Parent Intervenors of due process of law contrary to the requirements of the Fourteenth Amendment to the Constitution of the United States.

### **Fifth Defense**

32. Granting of the relief prayed for by the Plaintiffs would constitute a decision by this Court that the public is disabled to lease premises for solely secular uses, and without religious entanglements, in fulfillment of public needs solely on the ground that the lessor is a religious entity. Thus would be created a standard whereby the state would, in each case, be required to disregard the fact that a facility was in all respects secular and without religious entangling relationships and instead inquire into the religious nature and activity of the lessor, or the degree thereof. This would impose a religious standard upon public transactions violative of the Establishment Clause of the First Amendment to the Constitution of the United States.

### **Sixth Defense**

33. Granting of the relief prayed for by the Plaintiffs would deny the Student Intervenors the public benefit to which they are entitled of part-time education in a public school solely on the ground that they have part-time attendance at a religious school. Thus such relief would place a direct and unconstitutional burden upon the religious liberty of such children contrary to the prohibition of the Free Exercise Clause of the First Amendment to the Constitution of the United States.

WHEREFORE, the Intervenor Defendants pray the Court to dismiss the Complaint and to enter Judgment in favor of all Defendants.

Dated: March 3, 1981.

**STIPULATION REMOVING CONSIDERATION  
OF GRPS TITLE I PROGRAMMING**

Filed June 10, 1981

[Caption Omitted in Printing]

IT IS HEREBY STIPULATED by and between the parties of record, through their respective attorneys, that the scope of the instant litigation does not include any claim by plaintiffs which challenges the constitutionality of the Title I Program of the Board of Education of the Grand Rapids Public Schools under the Elementary and Secondary Education Act of 1965.

**DILLEY & DILLEY**

By Albert R. Dilley /s/

Albert R. Dilley (P12777)  
Attorneys for Plaintiffs  
545 Old Kent Building  
Grand Rapids, MI 49503

Dated: June 3, 1981

**BAXTER & HAMMOND**

By William S. Farr /s/

William S. Farr (P13306)  
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Grand Rapids, MI 49503

Dated: June 2, 1981

**HUBBELL, BLAKESLEE &  
HOULIHAN**

By Stuart D. Hubbell /s/

Stuart D. Hubbell (P15204)  
Attorneys for Party Intervenors  
P. O. Box 707  
Traverse City, MI 49684

Dated: June 2, 1981

By Gerald F. Young /s/

Gerald F. Young (P22640)  
Attorney for State Defendants  
750 Law Building  
Lansing, MI 48913

Dated: June 2, 1981

**ORDER**

Upon reading and considering the above Stipulation and Order Removing From the Instant Proceedings any Consideration of Defendant Board of Education of the Grand Rapids Public Schools' Title I Program Under the Elementary and Secondary Education Act of 1965, and the Court having been otherwise fully advised in the premises, NOW, THEREFORE,

IT IS HEREBY ORDERED, adjudged and decreed that the scope of the instant litigation does not include any claim by plaintiffs which challenges the constitutionality of the Title I Program of the Board of Education and the Grand Rapids Public Schools under the Elementary and Secondary Education Act of 1965.

/s/  
Benjamin F. Gibson

**OPINION OF U.S. DISTRICT COURT  
DENYING PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION AND MOTION  
FOR SUMMARY JUDGMENT**

Filed September 2, 1981

[Caption Omitted in Printing]

This case involves a challenge under the Establishment Clause of the First Amendment of the United States Constitution to the constitutionality of a "shared time" instructional program. The program provides non-public school students with certain classes under the auspices of the public school district in leased classrooms located in non-public schools. The instruction is in "supplementary" as opposed to "core" subjects, and includes, e.g., remedial and enrichment classes, driver education, art, music, physical education, and environmental education. Over 10,000 students now participate in the program, which has existed since 1975 and presently employs some 472 teachers on a budget of approximately \$2.5 million.

Plaintiffs are individual Michigan taxpayers who are voters registered in the City of Grand Rapids, and an association whose members include Michigan residents and whose organizational objective is to defend, maintain, and promote the constitutional principle of separation of church and state. Plaintiffs have moved for a preliminary injunction and for summary judgment.

**PRELIMINARY INJUNCTION**

The criteria to be considered upon a party's application for an injunction are well-established: (1) the strong or substantial likelihood or probability of success on the merits,

(2) the irreparable nature of the harm to the party seeking injunctive relief, (3) whether an injunction would cause substantial harm to others, and (4) the impact of the ruling on the public interest. *E.g., Roth v. Bank of the Commonwealth*, 583 F.2d 527 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979). In this case the equities weigh against the issuance of a preliminary injunction.

It is not at all clear that plaintiffs are substantially likely to prevail on the merits. Although plaintiffs contend that *Americans United for Separation of Church and State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980), is controlling precedent, defendants have presented sufficiently meritorious arguments that this case is factually distinguishable to diminish any strong probability of success emanating from the *Porter* decision. Moreover, a unanimous three-judge panel opinion issued since *Porter* suggests additional doubts about plaintiffs' probability of success on the merits. In *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980), *appeal dismissed*, 101 S.Ct. 55 (1980), *rehearing denied*, 101 S.Ct. 601 (1980), the provision of secular instruction by public school teachers to non-public school students on the premises of non-public schools, pursuant to Title I of the Elementary and Secondary Education Act of 1965, was sustained against attack under the Establishment Clause. It also should be noted that the Michigan courts have directly upheld substantially similar programs even when measured against both the First Amendment and Michigan's more specific constitutional bans on governmental aid to religious schools. *Traverse City School District v. Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971); *Citizens to Advance Public Education v. State Superintendent of Public Instruction*, 65 Mich. App. 168, 237 N.W.2d 232 (1975), *leave denied*, 397 Mich. 854 (1975). Under these circumstances, plaintiffs have not established a strong likelihood of success on the merits.



The only harm plaintiffs will suffer from a continuation of the "shared-time" program is the allegedly improper use of a portion of their tax contributions. The continuation of the program will not cost them additional taxes. If they succeed on the merits, the principle they wish to establish will ultimately be upheld. On the other hand, an injunction at this stage, far from preserving the status quo, will disrupt defendants' administration of an educational program at a time when teachers and pupils have been assigned and the beginning of the academic year is only days away. The real harm would be suffered by the children who would be deprived of significant, and in some cases critical, educational services such as specialized remedial instruction for students with reading disabilities.

While the continued vitality of a constitutional principle is obviously in the public interest, this Court cannot ignore the public interest in maintaining the quality education that a community has chosen to provide for its youth. The balance of hardships dictates a denial of the preliminary injunction here as clearly as it did in *National Coalition for Public Education and Religious Liberty v. Califano*, 446 F. Supp. 193, 195 (S.D.N.Y. 1978):

Moreover, if the absence of irreparable harm to these plaintiffs is compared to the hardship which an injunction would cause to the defendants in this case, the inappropriateness of a preliminary injunction becomes even clearer. In New York City alone, Title I funds to be expended for the current academic year (1977-78) amount to more than \$10,000,000; services are being provided to over 13,000 pupils through the employment of more than 400 persons. . . . To halt this program in the middle of an academic year, at a time which can only be deemed arbitrary in light of the history of this litigation, would be to work an unwarranted hardship on these de-

fendants. Such relief would also harm the public interest in the continuity of educational programs, a factor which must also be weighed by this Court. . . . Accordingly, the plaintiffs' request for a preliminary injunction is denied. (citations omitted)

### SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate only when "there is no genuine issue as to any material fact." In this type of constitutional challenge, this Court takes guidance from the discussion by the Sixth Circuit Court of Appeals in *Felix v. Young*, 536 F.2d 1126, 1135 (6th Cir. 1976):

As we have stated on many occasions, without an adequate factual basis on the record, a District Court should be extremely hesitant to grant summary judgment on important and complex issues. The adequacy of the record is particularly important where the court is called on to decide questions of constitutional law without benefit of a trial. (citations omitted)

This Court is further aware of the Supreme Court's treatment of this type of issue in *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1975):

The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts. . . . (citations omitted)

This Court finds that the factual record is presently inadequate and that there are questions of fact to be resolved in this case. These include whether the Grand Rapids program is "identical" in all relevant respects to that of Traverse City in the *Porter* case; which, if any, of the 43 institutions involved here fit within the profile of a "pervasively sectarian school"; who makes decisions about where and when classes will be offered and who will be allowed to take them; and who supervises the personnel of this program in their various functions.

Accordingly, plaintiffs' motions for a preliminary injunction and for summary judgment are denied. However, in denying plaintiffs' motions, the Court does not decide that the constitutional challenge to the "shared time" instructional program is without merit. Rather, the Court merely determines that it is inappropriate to make this decision at this time without the benefit of a trial and consideration of all relevant facts.

IT IS SO ORDERED.

Benjamin F. Gibson /s/  
BENJAMIN F. GIBSON  
UNITED STATES  
DISTRICT JUDGE

Dated: September 2, 1981-

**ORDER DENYING PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION AND MOTION FOR  
SUMMARY JUDGMENT**

Filed September 2, 1981

[Caption Omitted in Printing]

In accordance with the attached Opinion dated September

2, 1981, IT IS HEREBY ORDERED that plaintiffs' motions for a preliminary injunction and for summary judgment be denied.

IT IS SO ORDERED.

Benjamin F. Gibson /s/  
BENJAMIN F. GIBSON  
UNITED STATES  
DISTRICT JUDGE

**ORDER OF U.S. DISTRICT COURT  
DISMISSING AMERICANS  
UNITED FOR SEPARATION OF CHURCH  
AND STATE AS PARTY PLAINTIFF**

Filed August 16, 1982

[Caption Omitted in Printing]

**ORDER**

In accordance with this Court's Memorandum Opinion of even date;

IT IS HEREBY ORDERED AND ADJUDGED that Americans United for Separation of Church and State are dismissed as Plaintiff from the above captioned matter.

Richard A. Enslen /s/  
RICHARD A. ENSLEN  
US District Judge

DATED: August 16, 1982

**RULE 41(b) JUDGMENT PARTIALLY  
DISMISSING ACTION**

Filed August 19, 1982

[Caption Omitted in Printing]

The issues in the above-entitled action having been regularly brought on for trial at the May term of this Court, and the parties having duly appeared by their respective attorneys and the allegations and proofs of the plaintiffs having been heard in support of plaintiffs' contentions, and the defendants having jointly made a Rule 41(b) Motion to Dismiss at the conclusion of plaintiffs' case regarding the Downproofing, Outdoor Education, and Driver's Education programs, and due deliberation having been had, and the Court having directed a judgment in favor of the defendants with respect to such programs, it is hereby:

ORDERED, ADJUDGED AND DECREED that plaintiffs' claims with respect to the defendant Board of Education's Outdoor Education, Downproofing, and Driver's Education programs be, and the same are hereby dismissed, with full prejudice.

Richard A. Enslen /s/  
Richard A. Enslen

**NOTICE OF APPEAL**

Filed August 19, 1983

[Caption Omitted in Printing]

NOTICE IS HEREBY given that defendant, School District of the City of Grand Rapids, a municipal corporation, hereby appeals to the United States Court of Appeals for the

Sixth Circuit from the Final Judgment entered in this action on August 16, 1982, except that no appeal is taken from such judgment on the merits to the extent it prohibits physical education and industrial arts shared time classes at the secondary level and community education classes at the secondary level.

**BAXTER & HAMMOND**  
Attorneys for Defendant Board  
of Education of the Grand  
Rapids Public Schools

DATED: August 18, 1982

By William S. Farr /s/  
William S. Farr (P13306)

By John R. Oostema  
John R. Oostema (P26891)

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

AMERICANS UNITED FOR  
SEPARATION OF CHURCH  
AND STATE, et al,

Plaintiffs,

v

SCHOOL DISTRICT OF THE  
CITY OF GRAND RAPIDS, et al,  
Defendants.

No. G 80-517

Excerpts from the Sworn Offer of Proof of David J. Bailey,  
Assistant Superintendent of Personnel:

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools as Assistant Superintendent of Personnel. I am a resident of the City of Grand Rapids, State of Michigan.

\* \* \*

9. In general, the Board of Education has a uniform hiring procedure which it follows regarding the employment of all teachers. As such, the description of the hiring procedure to follow applies equally to teachers who provide services in the Shared Time program. Except as noted, there is absolutely no difference in the procedure which applies. Also, it must be remembered that the details involved in the hiring procedure depend upon the type of employee being employed, that is, whether or not the employee is a hourly as opposed to a contracted, full-time employee. With respect to the former category, of course, the hiring procedure is much less detailed.

10. After being advised concerning the availability of a teaching position, Mr. Richard Carlson, the Director of Personnel, who is directly responsible to myself as his Administrative Supervisor, first examines the "lay-off" list in order to determine whether there are any eligible individuals on that list who could fill the position available. Of course, if qualified and eligible teachers can be found on this list, our office is required to then assign that person to such opening. If there are no individuals available on that level, we then review a list of interviewees which are kept on file with the Board. If a review of the list of interviewees does not enable us to satisfactorily fill the position available, we then go through a list of applicants kept on file with the board. Generally, in connection with the elimination process set forth above, Mr. Carlson will often contact the school principal where the vacancy exists in order to receive any input or recommendations which he/she might have with respect to the proposed hiring. If he/she does, those individuals will also be considered as part of the hiring process. We then go through a screening process in which the prospective teachers are again comparatively reviewed in terms of their credentials, resumes, recommendations and the like. Then a formal interview is normally held by the Personnel Department, often attended by subject area supervisors if the available position involves the teaching services of a consultant or specialist, such as physical education, music, art, reading, math, etc. After this process has been completed, Mr. Carlson will then make a recommendation to myself and it is my responsibility to submit my recommendation concerning hiring to the Board for its deliberation, consideration and action. If the Board votes favorably on my recommendation, that individual is then specifically hired to fill the available position which initiated the hiring process outlined above.

11. The hiring process involved in the shared time situation does not in anyway differ from the hiring procedure

outlined above with the exception that during the interview process, special emphasis is placed upon the status of that individual as a public school employee, and all of the duties, responsibilities and obligations that entails.

12. The purpose to be achieved by and through the procedures set forth above is to provide to our students the best possible teachers for the positions available. Excellence is and always has been our goal.

13. We never inquire of any teacher regarding that teacher's religious affiliation, if any, inasmuch as we feel that such inquiry has nothing to do with the qualifying factors which we consider important in evaluating prospective teachers. Our goal of excellence can be achieved without any reference or consideration of the question of religious affiliation.

14. Following hiring, my department, that is, the Personnel Department, is then responsible for the supervision of the Progressive Evaluation Program (PEP) which is used by the district to continually review the quality of the education being provided by its teachers. Under that program, all probationary teachers during their first two years of employment with the board are evaluated each year. Beyond that, following tenure, such teachers are reviewed once every three years beginning with the first tenured year. Other than in the specialists and consultants fields, the evaluation process is carried out by the school principal who then directly reports to the Personnel Department. Insofar as the Shared Time program is concerned, in light of the fact that the teachers involved in that program are all specialists and/or consultants, the specific evaluation process is implemented by the subject area supervisors, who are then required to submit a written evaluation to the Personnel Department for subsequent handling. Generally speaking, each year, we provide each subject area supervisor with a list of the teachers

who must be evaluated during the upcoming school year together with a proposed calendar when such evaluations should be turned in to the Personnel Department. Once that evaluation has been received, if satisfactory, it will be simply placed within the permanent personnel record of that teacher. If, on the other hand, the evaluation is unsatisfactory and termination or other action is recommended, our office then goes through a three-step process which begins with an initial meeting between Mr. Richard Carlson and the teacher, to discuss the evaluation. Following that meeting, which allows the teacher an opportunity to explain or rebut the information set forth in the evaluation, Mr. Carlson then makes a recommendation to myself for further handling. Although Mr. Carlson has many options available to him, and not all unsatisfactory evaluations necessarily proceed to the second step, if they do, the next step in the process would require a meeting between the teacher and myself. I then would be required to similarly make a recommendation regarding the further handling of that teacher to the Superintendent of Schools, Dr. John Dow. If necessary, the matter may proceed to the third and final step through recommendations to the Board for termination through the tenure process.

15. The evaluation and termination procedure apply district-wide, and therefore necessarily apply with the equal force to shared time teachers. Of course, in the event termination is the end result, that termination must be voted upon by the Board of Education of the Grand Rapids Public Schools, based upon the recommendation of its staff.

16. Then finally, the Personnel Department is also responsible for the "lay-off" and "recall" procedure which, as was true with respect to the other matters set forth above, applies with equal force to shared time teachers. Teachers of the district are laid off and recalled on a seniority basis.



17. It can be stated, in summary, without hesitation, that the operation in my department with respect to any personnel-related matters is not in anyway affected by the status of the teacher as a shared time teacher. All of the personnel policies and procedures are consistent and uniform throughout.

[Jurat and Signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of Elisabeth Rowlands, Supervisor of Reading:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools as Supervisor of Reading, K-12, in charge of Reading programs at the elementary, middle school and senior high levels. I reside at 665 Walsh, S.E., County of Kent, State of Michigan.

• • •

8. Since 1979 my responsibilities as Supervisor of Reading have been expanded to include the Reading portion of the Shared Time program.

9. In the Fall of 1978, a pilot remedial reading project began on premises leased by the GRPS as public school classrooms in five nonpublic schools. This program was managed by Community Education (administratively) with the supervision of content of curriculum, materials and teaching staff being the responsibility of the Supervisor of Reading.

10. Since that time the Shared Time Reading Program has been enlarged by the GRPS to meet the needs of more students by leasing premises as public school classrooms, at twenty-five (25) nonpublic schools. As Supervisor, I am responsible for supervising curriculum content, materials and staff.

11. As Supervisor of Reading, I have delegated some of the responsibilities for the Shared Time Reading Program to Ms. Elsa Gekus, a math consultant with reading training, with the Grand Rapids Public Schools as my assistant. She coordinates the day-to-day functions of the program such as in-service training, scheduling meetings, ordering materials, and in-servicing teachers on specific teaching techniques. In-service opportunities for teachers during the 1980-81 and 1981-82 school years have included those matters noted in Exhibit 1, attached, which is incorporated herein by reference as though fully set forth.

The above in-services are in addition to the monthly staff meetings and in-services held for all Grand Rapids Public Schools reading personnel. The Monday staff meetings involve procedural and administrative matters; the Friday in-services provide increased knowledge of teaching techniques, curriculum development, and awareness of new programs and/or materials.

12. Prospective reading teachers are interviewed by the Supervisor of Reading to ascertain their training and preparation as well as experience level. Reading teachers must have a minimum of three years of successful classroom teaching and a minimum (or the equivalent) of 12 semester hours in graduate course work in reading as recommended by the State of Michigan.

These requirements are the same whether the candidate is being considered for an assignment on premises owned or leased by the GRPS, or both. If the candidate has the training and experience, the Supervisor of Reading recommends to the Director of the Shared Time Program and the Personnel Director (Mr. Richard Carlson) that the person be hired.



13. During the interview process, the responsibilities of reading personnel are discussed. The Shared Time program is presented as:

1. A Grand Rapids Public Schools program based upon Grand Rapids Public Schools curriculum for reading.
2. A support service to compliment the reading instruction provided by classroom teachers.
3. A self-contained program funded by the Grand Rapids Public Schools on leased Grand Rapids Public Schools property.
4. As any employee of the Grand Rapids Public Schools, reading personnel are under the supervision of the Supervisor of Reading.

Careful attention is given to discussing the functioning of the reading person in relation to procedures for

1. identifying students who will receive services;
2. scheduling classes;
3. ordering materials;
4. providing services;
5. attending in-services/meetings.

If at all possible, the Director of Shared Time sometimes attends such interviews to discuss contractual areas such as payroll, fringe benefits, record keeping responsibilities and the like.

These guidelines are reviewed at staff meetings as the need arises, as noted in the attached Exhibit 1.

14. The Reading program is designed to provide support services to students in addition to the reading instruction provided by classroom teachers. Underlying the three types of services provided is the Grand Rapids Public Schools Reading Performance Objectives, which is attached and marked as Exhibit #2, which Exhibit is incorporated herein by reference.

There are three types of services offered:

1. *Remedial*: for students reading below grade level. Diagnostic tests are administered to ascertain skill deficiencies. Once skill deficiencies are identified, materials are purchased, developed, or borrowed from the Reading Department or Instructional Media Center of the Grand Rapids Public Schools to assist teachers in providing specific skill instruction. Students who make sufficient progress are dismissed when the time is appropriate and other students are identified to begin reading services.
2. *Developmental*: for students reading on or about grade level who demonstrate difficulty in mastering new concepts/skills or who need more opportunities for instruction/practice to master skills. As above, diagnostic testing is administered by the shared time reading teacher to identify areas of need. Once these areas are identified, materials are secured through the channels noted above, and instruction begins.
3. *Enrichment*: for students reading above grade level who demonstrate the potential for increased achievement. As a support system, the objectives are to chal-

lenge the excellent reader in such areas as vocabulary study, literature discussion groups, advanced study skills, newspapers/magazine reading, and library/reference work skills. Units of study are developed and/or commercial materials are secured to assist the teacher in providing enrichment experiences.

15. The Reading program follows the reading objectives of the Grand Rapids Public Schools and uses the wide variety of supplementary materials found in the public schools to accomplish these objectives. As in the public schools, the reading teachers in nonpublic schools do not utilize the building reading program to provide for students' needs. Supplementary materials are purchased or secured on loan from Grand Rapids Public Schools sources such as the Reading Department, the Instructional Media Center, the Grand Rapids Library System and Kent Intermediate School District.

16. Materials purchased for the program are requested by the individual reading teachers. Purchase requisitions are submitted to Elsa Geskus. (If the material is unknown to her, specimen sets are secured for review.) If the materials are judged to be satisfactory for use in the stated area of need, the purchase requisitions are processed. All materials are delivered to the Reading Department Office at Congress School, and then forwarded to the teacher.

An inventory of all materials purchased is on file at the Congress School Reading Office and/or Ms. Geskus' office.

17. Children considered eligible for reading support services are identified by classroom teachers and building administrators. These names are given to the Shared Time reading teacher. If, after diagnostic testing is completed, the children are, in fact, eligible, schedules are established. Scheduling is

done to compliment the schedule of the non-Grand Rapids Public Schools program; children are not removed from reading class to receive reading support services. If there are any problems in establishing the schedule, the teacher turns to either Ms. Geskus or myself for suggestions and/or assistance.

18. The entire program in reading is designed to benefit students and to compliment their academic successes.

19. Full-time Shared Time reading teachers are supervised by myself as Supervisor of Reading. When visiting Shared Time reading teachers, I observe a minimum of one complete class session. Following the visitation, an informal conference is held with the teacher to discuss areas of strength and weakness as observed. Appropriate suggestions are made to assist the teacher in strengthening the program. Thereafter, a written evaluation is prepared and forwarded to the Personnel Department.

20. During the supervisory visits, I usually contact the appropriate administrator of the nonpublic school to advise of my visit and to make myself available for discussions regarding the program.

21. I am unaware of any attempts on the part of the nonpublic authorities to supervise the Shared Time reading staff. Similarly, I am unaware of any attempts on behalf of the nonpublic staff or administration to try to religiously influence the Shared Time reading teachers as individuals or as teachers, either in terms of teaching strategies or content.

22. Contacts with the nonpublic personnel, both administrators and classroom teachers, are very brief and informal. As noted in paragraph 19, I routinely "check in" at the school office when visiting to apprise them of my presence and whom I will be visiting. Occasionally I have chatted with the prin-

principal momentarily if time permitted, but none of my conversations have ever involved religious topics. Often the principal will comment on what a fine service we are providing and what a nice person the reading teacher is! I know of no instance where the nonpublic administrator has attempted to exercise supervisory control over the Shared Time reading personnel or to exert religious influence or pressure.

23. Communication between classroom teachers at the Shared Time schools and myself is nonexistent for all practical purposes. I have encouraged the Shared Time teachers to build a professional rapport with the classroom teachers as the exchange of information is vital to assuring continuity of instruction for students receiving support services. It is important that classroom teachers are aware of the successes and failures of students in acquiring reading skills. To my knowledge, all communications have pertained to the academic (reading) needs of students and have not involved religious matters or concerns.

24. Shared Time reading classes are conducted in space leased by the Grand Rapids Public Schools. Signs explaining the lease and purpose of the lease are prominently displayed in the reading room. Religious symbols have been removed. When, on one occasion, a religious symbol was observed, I talked with the teacher and the principal to rectify the matter. Without hesitation on anyone's part, the matter was quickly resolved and the symbol was removed.

25. At no time have I, as Supervisor of Reading, experienced any religious pressure or influence being directed toward myself, the Shared Time reading staff, or the reading program. My experiences have been positive; the nonpublic school administrators have been most complimentary of the

services provided. Whatever religious atmosphere exists has not affected our reading program or personnel.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
Margaret Kroon, Reading Teacher:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools, teaching reading to students in grades 2 through 8, on premises leased by the GRPS as public school classrooms, at Holy Spirit (a nonpublic school), and to students in grades K through 6 at Riverside Elementary (a public school).

• • •

4. I am caucasian and have been a Catholic for the past three years.

• • •

7. I have been teaching in the Shared Time program of the Grand Rapids Public Schools since September 1981 teaching remedial and developmental reading at Holy Spirit, working with students in grades 2 through 8 and at Riverside Elementary, working with students in grades K through 6.

8. I was assigned to the Shared Time program this year by my supervisor, Betty Ann Rowlands. Placement in a nonpublic school did not cause me any concern. So far as I am aware, the nonpublic school administrators had absolutely nothing to do with my assignment.

9. At our initial meeting in the Fall with Elsa Geskus and John Young, we (the Grand Rapids Public Schools Shared



Time reading teachers) were given a written list of instructions. Among other things, those instructions indicated that religious articles were to be taken out of the classroom and we were to carry a sign and put that sign up when we do our presentations in the classrooms. I understand that my supervisor is Betty Ann Rowlands who supervises reading. Elsa Geskus is the person who coordinates shared time math and reading. John Young is Elsa's supervisor. I go to Elsa with requests for materials and supplies but Betty Ann is my supervisor.

10. I have no materials that belong to Holy Spirit. All of the materials that I use are Grand Rapids Public Schools property.

11. I have always understood that I should conduct myself as a public school employee, and all that entails. I teach using the Grand Rapids Public Schools Curriculum Guide, using Grand Rapids Public Schools materials and supplies.

12. When I was assigned to teach on leased premises at Holy Spirit, I had to spend a considerable period of time testing and evaluating the children which were suggested as being eligible for my teaching services, in order to pinpoint their academic needs. I understand that my role is that of a reading instructor, which is different from the role which the regular classroom teacher must play in connection with the teaching of a base program in reading. My services are not at all designed to serve as a base program for reading, but rather to serve as a supplement to meet specific educational needs so that students may more successfully learn the reading process. In addition to my independent testing, I also reviewed the existing test data which was available to assist me in the process of not only identifying students, and diagnosing their problems, but also in preparing and organizing a supplementary program which would effectively meet the

needs which I have identified. I am, so as far as I perceive the situation, the final authority concerning those who may participate in and receive my services as long as I follow Shared Time "numbers" guidelines. All of the students which I teach have a regular reading class as part of their base curriculum. The teaching services which I provide are truly supplementary.

13. When I first arrived at my assignment, I noticed that there were religious statues in my room, and accordingly, I requested that the school principal immediately remove those symbols, which she did.

14. Approximately 40% of the work which I do is remedial in nature, the balance being mostly developmental and/or enrichment. One of the criteria I used in selecting the children for the remedial reading class was the Iowa Basic, which was the test administered last year by Holy Spirit. I looked for children who have a two-year deficiency in a total reading battery with a scatter in scores. I looked primarily for a child, for example, who has a higher math score than reading score because it is my belief, from my training, that the math score is a better indicator of intelligence than the reading score. In addition, the following tests are usually given:

1. The Standard Reading Inventory — listening comprehension section.
2. Silvaroli Informal Inventory — graded word lists and oral paragraphs.
3. Phonics Inventory — which is used to identify elements in the language which a child fails to identify in spoken words.

4. Durrell Analysis of Reading Difficulty — visual memory of words, letter naming and producing sounds of the letters.
5. Informal List of Writing the Alphabet
6. Gray Standardized Oral Reading Paragraph.
7. Wepman Auditory Discrimination Test
8. Roswell-Chall Auditory Blending Test

15. I do discuss with the classroom teachers the students that I feel should receive modified Oston-Gellingham instruction. However, I have the final authority as to who is eligible for and included in the classes I teach. The first two or three weeks I spent at Holy Spirit was completely involved in testing. When I started my classes I was sure who I was going to work with.

16. In remedial reading, I work with 3rd, 4th, 5th, and 8th graders. Class size is generally 5 students per class.

17. An example of the type of student I see would be the type of student who has failed to develop the visual acuity necessary to distinguish the parts of a word correctly. To see, for example, letter positioning, to see fine differences like slid and slide. It may be this type of child that does not distinguish between "wh" and "sh" in a sound or a word. With most of my remedial students, their biggest problem concerns the process of organizing reading, writing and spelling into an integrated process. Children who may be able to read fluently may not be able to write or spell. To help remedy that situation, additional multisensory reinforcement in the teaching-learning process is required to improve their reading, writing and spelling abilities — a service which I provide as a specialist.

18. I have had informal contact with a majority of the parents of the students I work with. Many of the parents have come to meet me and seem very pleased with my services.

19. I see the basic function of the program as helping children to achieve, to their capacity, in reading.

20. The instruction I provide in no way serves as a substitute for the regular reading curriculum. As I perceive my role at the developmental level, my services represent an academic "shot in the arm". For the child needing true remedial help, these services are a necessity for success.

21. It is my understanding that the plaintiffs in this action have suggested or may suggest that an acceptable alternative to the present Shared Time program for nonpublic schools students would be to provide these shared time services at some location other than the nonpublic schools. The difficulty I perceive from an educational point of view as to bussing the children to another site, outside of the economic, is the time loss involved with the children. For example, a Holy Spirit child traveling to the Grand Rapids reading clinic would need to have an additional 45 minutes a day of travel time, so he would be missing an hour and one half of the school day.

22. None of the materials I utilize are owned by or received from the nonpublic schools. The materials I use are Grand Rapids Public School property and when not in use, kept locked in a file cabinet.

23. As far as I know, nonpublic school teachers or administrators have no input into my evaluation process as a teacher. My supervision and evaluation as a teacher is the responsibility of my Grand Rapids Public Schools supervisor.

The principal at Holy Spirit has never sat through any of my classes nor has she ever asked to sit through any of my classes.

24. There are no religious symbols or artifacts whatever in my reading room. I would not term the atmosphere at Holy Spirit as being religious, but rather, one which is more structured — and with greater academic demands. Assuming there were something called a religious atmosphere at Holy Spirit, it would not and does not in any way affect the substance of what I teach or how I teach it. Additionally, I have never felt any particular influence or pressure of a religious nature. I provide my services as I would to any reading student.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
Ethel Riptoe, Reading Teacher:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools, teaching reading at Madison Elementary (a public school) and St. Francis (a non-public school).

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4. I am black and a member of the Baptist faith.

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8. This school year is actually the first year that I was ever assigned to teach, for a least a portion of my time, in any nonpublic school setting. This year I am teaching at

Madison Elementary (a public school) and St. Francis (a non-public school).

9. My assignment to St. Francis was simply that — an assignment. I did not request that particular assignment nor, to my knowledge, did the nonpublic school administration at St. Francis have anything to do with my appointment as a reading teacher either.

10. When I was assigned to the Shared Time program I was specifically instructed that I should behave and conduct myself as a public school employee at all times. I understand that I am to utilize the Grand Rapids Public School curriculum together with the necessary materials and supplies of the public schools which I find necessary in providing my teaching consultant services. I am also aware of the fact that the room in which I teach is supposed to be a designated (and it is) as a public school classroom. I am sensitive to the issue of religious symbols and have made sure that the room in which I teach is free of any and all religious symbolism. In fact, some of the reading consultant services which I provide are provided in a single room, designated as a public school reading room. The room is absolutely stripped of any religious symbols of any sort.

11. As a reading consultant, my function is to provide specialized instruction to students who can benefit from my services. I am a specialist and therefore offer to these students something which would not otherwise be available in their regular reading curriculum. I believe that each of the students which I teach have a regular reading class as part of their base curriculum over and above the services which I provide. My function is completely supplementary in nature.



12. All of the materials and supplies which I use are either purchased through or supplied by the Grand Rapids Public Schools. To my knowledge, no one at St. Francis has ever tried to use any of my materials or supplies.

13. As a matter of fact, I have very little contact with the nonpublic school administration or classroom teachers in light of the fact that I am only at St. Francis for a short period of time during which I have many things I must accomplish. I simply don't have time to have that much direct contact with the nonpublic school administrators and/or teachers.

14. Consequently, I have felt absolutely no religious pressure or influence of any type upon either me, or the services which I provide. For example, no one has ever tried to encourage me to incorporate religious matters into the subject that I teach, nor have I ever felt uncomfortable in the setting where I teach. My goals and function are the same — I teach children reading and enrichment.

15. I provide grades for all of the students which I teach and follow the Grand Rapids Public School Grading procedure in terms of communicating those grades to the students' parents.

16. I always have been and still am under the direct supervision and responsibility of Betty Ann Rowlands, the Supervisor of Reading. To my knowledge, the nonpublic school administrators have absolutely no input into the evaluation process which the Board of Education uses for its teachers.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
William Oosse, Math Supervisor:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools as Supervisor of Mathematics and Science in charge of the Mathematics, Science, and Outdoor Education programs in grades K through 12, which includes Shared Time Mathematics and Outdoor Education.

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3. I am a caucasian and a member of the Christian Reformed faith.

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11. During the 1977-1978 school year, the supervision of Shared Time Outdoor Education was added to my responsibilities and continues to the present.

12. During the 1978-1979 school years, my duties were further enlarged to include the supervision of the Shared Time Mathematics program.

13. In my present position as Supervisor of Mathematics and Science, I am responsible for the supervision of K through 12 Mathematics, K through 12 Science, and K through 12 Outdoor Education. Duties in each of these areas include leading curriculum meetings, planning teacher in-service sessions, staff evaluations, scheduling of staff, as well as arranging outdoor education, and supervising the Shared Time Mathematics and Outdoor Education programs. Each year, my staff and I conduct staff evaluation sessions in methodology, record keeping, and familiarity with new materials.

14. Recently, a portion of my responsibilities with respect to the Shared Time Mathematics Program has been delegated, although still under my supervisory control, to Ms. Elsa Geskus.

15. Shared time teachers, like all public school teachers, are hired under the following procedure. The prospective teacher employee makes application through the Personnel Office. Qualified applicants are thereafter interviewed by the Personnel Department people and/or myself or the Mathematics Coordinator. Following the interview, the interviewer makes a recommendation, following which successful candidates are hired as openings occur.

16. With respect to the instruction process, Shared Time teachers are always given specific guidelines with respect to their conduct and work. These instructions include such things as:

1. Introduction to their supervisor (evaluator);
2. They are public school teachers and are expected to conduct themselves according to Grand Rapids Public Schools policy;
3. How to order supplies;
4. Items needed in Grand Rapids Public Schools personnel file;
5. Working hours, who to call in case of illness, and weekly schedule;
6. Maintenance of student attendance records (if applicable);

7. The schedule of in-service sessions;
8. Evaluation process and classroom visits by the supervisor;
9. The requirements of the public school curriculum both in remedial and enrichment mathematics;
10. How to inventory materials;
11. Pay dates and other public school calendar information;
12. That as a public school teacher, the room should be free of religious symbolism and discussion, and further, if religious questions occur, to avoid discussing them and to move on to the objectives required.
17. The Shared Time mathematics area concerns itself with enrichment and remedial mathematics.

Enrichment mathematics provides talented students with advanced work not otherwise available, or all students an occasional look at topics of interest, but not necessarily included in the core curriculum. Such topics would vary with each grade and could include geometry in elementary grades or algebra in grades 7 or 8.

Remedial mathematics provides students who are considerably behind grade level with concentrated work in basic skills. Small groups of students are pulled from one of their regular classes to work on such things as addition, subtraction, multiplication or division at a lower level than would be expected of children at level. These groups could meet once or more per week. It is anticipated that such remediation would allow students to more successfully participate in their regular classes.

The objectives in the enrichment classes are established by the Shared Time teacher and the Grand Rapids Public Schools Mathematics Coordinator to meet the needs of identified and eligible students.

The objectives of remedial mathematics program are spelled out in the Grand Rapids Public Schools Minimal Mathematics Objectives booklet and taught according to individual student needs or needs of small groups. Further details regarding the purpose and operation of the program can be obtained by making reference to Appendix H which is incorporated herein as though fully set forth.

The specific aim of the program, of course, is to identify and meet the educational needs of eligible children who can benefit from the types of instructions named above. This objective is achieved in part by focusing on low pupil/teacher ratio, as well as the concentration on basic skill objectives. The Shared Time Mathematics program is designed and intended to benefit children.

18. The Shared Time Mathematics program follows the curriculum of the Grand Rapids Public Schools and utilizes materials and equipment purchased and supplied by the public school district. Needed materials are supplied to the shared time classrooms as the teachers request it on the Grand Rapids Public Schools Supply Request or Purchase Requisition Forms. These forms are evaluated by the Mathematics Coordinator or me, and if judged appropriate, materials are ordered using budgeted funds. This is exactly the same procedure used in the public schools.

19. In the Shared Time Mathematics class, students are nominated by the building principal or classroom teacher for enrichment or remedial classes. The shared time teacher then goes over test scores and past histories to verify the eligibil-

ity of students as classes are formed. The shared time teacher, the Mathematics Coordinator, and the nonpublic principal establish a time schedule which meets the needs of the students, and the shared time teacher.

20. Shared time teachers are subject to the direct, immediate, and exclusive supervision of the Mathematics Coordinator or myself, as appropriate, as we periodically visit shared time classrooms to observe and evaluate shared time teachers. During the visit, we will typically take a seat in the rear of the room and observe the teacher's presentation, concerning ourselves with both content and methodology. Such visitations are followed by discussions between the shared time teacher and the observer.

21. During supervisory visits, I usually contact the appropriate administrator of the nonpublic school to advise of my visit and make myself available for discussions regarding the program.

22. We do not permit the nonpublic administrators to supervise our employees. In fact, in the one instance where a nonpublic administrator did attempt to exercise supervisory control, the program was terminated.

23. Additionally, in-service training programs are periodically held to introduce my teachers to new teaching methods, new skills, or new course materials. Oral instructions are given or reviewed at many of these sessions, particularly as they relate to procedure, course content, record keeping, and other matters germane to shared time teachers.

24. As noted above, my contacts with the school authorities of the nonpublic schools are generally brief and casual in nature. It is my practice to go to the office of the nonpublic school that I am visiting in order to advise them of



my presence, and give me an opportunity to exchange pleasantries with the principal. Additionally, none of my communications with nonpublic school authorities have ever involved the discussion of any religious matters. I know of no instance in which a nonpublic school authority has attempted to subject any shared time teacher to religious pressure or influence.

25. I have no communication or contact with regular classroom teachers in the nonpublic schools which I visit. However, I am aware that the teachers I supervise do meet on occasion with regular classroom teachers in the nonpublic schools to exchange information about children enrolled in the Shared Time program. Such teacher-to-teacher communication is encouraged so the nonpublic teacher can gain a better understanding of the program, and the shared time teacher a better understanding of individual children. Such communications are expected to be completely professional, and to contain no mention of religious matters or concerns.

26. Shared Time programs are conducted in rooms leased to the Grand Rapids Public Schools. In some cases, rooms are used exclusively by the shared time teacher and those contain no religious symbols, to the best of my knowledge. In other cases, rooms are used incidentally or on a part-time basis.

In most of those cases, religious symbols are lacking. However, I do on occasion see religious symbols in rooms which may be visited once or twice a day. Teachers are specifically directed to ignore such and conduct the assigned lesson. Religious symbolism in Grand Rapids leased rooms is one area which I check during each visit.

27. I have experienced no religious influence or pressure as a supervisor in the Shared Time program for the Grand

Rapids Public Schools. In all of my contacts with religiously affiliated nonpublic schools, I have never felt my own religious precepts challenged or the manner in which I carry out my job questioned. Whatever religious atmosphere exists in such schools has never affected my work nor that of my subordinates. In fact, none of my shared time teachers have complained of any attempts on the part of nonpublic school authorities to impose religious pressures or influence on them, either in terms of their teaching practices, or course content.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
Lorrie Dahlke, Math Teacher:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools, teaching Math at Sylvan Christian (on leased premises) and Reading at St. Isidore (on leased premises).

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4. I am a caucasian and a member of the Reformed faith.

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8. This year I am teaching math at Sylvan Christian, grade levels 2, 3 and 5, and reading at St. Isidore, grade levels K, 1, 2, 3, 6, and 7.

9. The fact that I have been assigned to teach math and reading in the nonpublic school setting has not caused me any particular concern. I enjoy teaching children regardless of their background or religious affiliation.

10. Upon my employment with the Board, I was specifically given an orientation regarding the guidelines which I should follow in teaching in the Shared Time program. I was told for example, that the rooms in which I teach should be free of religious symbolism and the like, and also that the rooms in which I teach should be clearly designated as public school classrooms. I also understand that I am a public school employee, and that I am to provide services in accordance with the Grand Rapids Public School curriculum, using Grand Rapids Public School supplies and materials, so labeled.

11. This year I am teaching both remedial and enrichment reading and math. The general process involved for student selection is that the classroom teacher recommends certain students which I thereafter reevaluate to determine their strengths and weaknesses, to better enable me to provide meaningful and productive educational services. I am the final authority on which students attend my classes. In fact, throughout my teaching I continuously monitor the progress of my students and if, for example, I find that a given student has progressed as a result of my efforts, on occasion I will send such student back to their regular classroom in order to make room for others who need my services. The remedial classes tend to be very small, five or six students in number. Enrichment classes tend to be somewhat larger, involving approximately 14 or 15 students. In the enrichment field, I focus upon the sharpening of advanced skills, over and above that which would otherwise be available in the regular reading or math curriculum of the nonpublic school. All of my students, in math or reading, have a regular math or reading curriculum over and above the teaching which I provide. My services are not meant to in any way serve as a substitute for the regular reading and math curriculum, but rather, as a supplement. I have received only favorable feedback from the nonpublic school teachers regarding the value of my services.

12. I do not keep any record of the religious affiliation of my students although I do keep very complete attendance records, which are kept in a record book supplied by the Board of Education. I grade my students utilizing the Board of Education procedure which has been adopted for shared time students.

13. In my opinion, from an educational point of view, the provision of the math and reading services which I provide are most effective if provided during the regular school hours on leased premises. To do otherwise would in my judgment, be too disruptive to the teaching and educational process. Time on task is important.

14. All of the supplies and materials which I utilize are appropriately labeled as Board of Education materials. I keep those materials in my classroom. In each of the nonpublic schools where I teach I have a specific room in which I provide all of my teaching services. To my knowledge, none of the supplies and materials which I provide are used by anyone else in the school when I am not there. For example, no teacher has ever requested permission to use any of my supplies or materials.

15. My Board of Education supervisor is responsible for supervising and evaluating what I teach, and how I teach it as a teacher. To my knowledge, the nonpublic school administrations do not have any particular input in that process whatsoever.

16. The rooms that I use are clearly designated as public school classrooms by a sign which is placed inside and outside of the room. The rooms themselves are completely stripped of all religious symbolism.

17. As a Grand Rapids Public Schools teacher, I have never experienced any religious pressure or influence in the nonpublic school setting in which I teach. I have enjoyed my work and feel that I have been able to successfully accomplish my goals without ever feeling inhibited by the fact that the school in which I provide those services is a nonpublic school. Certainly no one has made any effort to influence me directly, or to make me feel uncomfortable because of the setting in which I teach. My function is to provide instruction which students would not otherwise have available to them in their regular curriculum. In my own mind, I believe that the Shared Time program has been very successful in accomplishing that purpose.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
Joe Leonardo, Physical Education Supervisor:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools as Assistant Director of Athletics and Physical Education in charge of the supervision of the Physical Education, Athletic, and Intramural Programs (which also includes the Shared Time instructional program) that are scheduled for our school district.

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4. I am of Protestant religious conviction and a Caucasian.

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8. In my present position I became involved with the Shared Time program in 1976. My supervisory responsibilities in relation to this program are as follows:

- A. Plan, supervise and evaluate the physical education curriculum for our shared-time schools;
- B. Develop and implement training programs for staff improvement;
- C. Prepare, compile and approve requisitions for the purchase of needed instructional equipment and supplies;
- D. Implement an in-service program for physical education instructors;
- E. Confer with principals on adopted time scheduling;
- F. Assist Personnel Department in teacher hiring selection process;
- G. Visit physical education classes to observe class organization, and teaching methods and evaluate the same; and
- H. Administer physical education budget.

9. Shared Time teachers, like all teachers hired by the district, go through a screening process which would include a personal interview, credit review, and administrative evaluation. As Assistant Director of Athletics and P.E., a recommendation is submitted to personnel for implementation.

10. Those instructors who are assigned to the Shared Time program receive orientation as it relates to their instructional responsibilities.



11. This orientation has included the guidelines for establishing:

- A. Daily time schedules for schools;
- B. Following the accepted district wide curriculum guide;
- C. Attendance procedures;
- D. Grading procedures;
- E. Equipment procurement; and
- F. Physical setting requirements (*i.e.*, no religious symbolism).

12. I am also responsible for scheduling and organizing staff meetings for informational data and in-service training programs. We meet bi-monthly to discuss physical fitness testing procedures, equipment orders, repair of equipment, safety in class activities, etc. Scheduled in-service meetings have included moenastics, instruction for senior citizens, self defense, mini-trampoline, disco dance, mainstreaming, etc. These staff meetings apply to all district P.E. instructors.

13. Most of the shared time instructors have dual assignments, that is, assignments are in the nonpublic and public school setting. Information relating to conduct on the job and contractual responsibilities are emphasized at our general meetings.

14. Our Physical Education program is aimed at offering a multifaceted service to children that they would not otherwise receive. The program provides for the educational needs of the nonpublic students the same as it would and does for the public school students. The curriculum is the same as well

as the goals and objectives that are established. In some instances, we provide a service which was not otherwise present. In all cases the service we offer in terms of its scope exceeds the service that was otherwise available to the nonpublic students. This program is not a substitute for any other program that is provided. The suggested sequence of activities for K through 6 students, the progression of skills taught, all written materials and equipment are the same for all Grand Rapids Public School physical education students. We do not look at students' needs as being different simply because of their public or nonpublic status, but as needs that must and should be met.

15. The philosophy stated in the Grand Rapids Public Schools Elementary Physical Education Curriculum Guide Book is the one that is adhered to by all instructors as stated, "Physical education is a vital part of the educational process which enhances the psychological, intellectual and social, as well as the physical development of the individual in our society today." Attached and marked as Appendix A and B are the Elementary Physical Education Curriculum Guide and the Senior High School Physical Education Minimal Performance Objectives and Instructional Units, both of which are incorporated as though fully set forth. These exhibits describe in depth the details of the Grand Rapids Public Schools Physical Education Program.

16. The activities and skill areas for students in early elementary would include spatial awareness, body mechanics, body awareness, locomotor skills, movement exploration, rhythms, ball handling, stunts and tumbling, and apparatus.

Activities and skill areas for upper elementary students would include football, soccer, volleyball, basketball, rhythms, floor hockey, stunts and tumbling, apparatus, track and field, dance and softball.

17. Materials that are needed for our physical education program are supplied either through the Physical Education Central Office or through our Supply Department which serves as our central equipment depot. Forms are distributed to all instructors at the beginning of the year for the procurement of equipment.

18. Supervision of shared time instructions falls under the same procedures that are established for all of our elementary consultants. A majority of my visits are unannounced to observe and evaluate the instructor and the program. A typical visitation would include a courtesy call to the principal of the building, observing at least two full classes, checking class organization, instructional techniques, safety precautions, utilization of time, quality of instructional time, class control, and objectives accomplished. I will then discuss my observation with the instructor and make any necessary suggestions. The written evaluation is then forwarded to the Personnel Department.

19. In all the years of my involvement in the Shared Time program, I have never been approached by nonpublic administration or staff to impose any of their religious beliefs or to try to influence the instructor or the type of instruction that is being offered.

20. As already indicated, my association with non-public administration is out of courtesy only. There has been some dialog that at times has centered on an instructor's starting and ending time, but any follow-up of concerns has been done by my approaching the instructor. At no time, as far as I am aware, has any nonpublic principal attempted to supervise the teaching activities of the instructors I supervise or to apply religious pressures on them.

21. The same could be stated with the contact with non-public teachers. My contact with them would be only a courtesy recognition. The physical education consultants contact would only follow the receiving of the students for class. Any problems or concerns a classroom teacher would have would only relate to individuals that might have physical or limited ability problems that would fall under professional responsibilities.

22. I make visits to all shared time facilities that are being leased from the nonpublic schools and, in general, shared time instruction in most cases is carried out in a multi-purpose or gymnasium setting, separate and distinct. As Assistant Director of Athletics and Physical Education, I am sensitive to the issue of religious symbolism and accordingly, in all cases, I have made special observations to assure that none are on display in those areas.

23. Since my affiliation with the Shared Time program, there has never been any religious influence or pressure placed on me as a result of my position. No one has challenged my religious beliefs or the way I conduct my responsibilities as they relate to my position. My experience in this program has been one of fulfilling an educational need for students regardless of their racial, social or religious backgrounds.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
Jerry Bentley, Physical Education Teacher:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools, teaching physical education. I teach grades K through 8 in premises leased by the



GRPS as public school classrooms at St. Thomas (a nonpublic school) on Monday, Wednesday and Friday and grades K through 6 at Sigsbee (a public school) on Tuesday and Thursday.

. . .

4. I am caucasian and a member of a religious group known as Immanuel of Grand Rapids.

. . .

7. I have been assigned to the Shared Time program of the Grand Rapids Public Schools since 1979, teaching physical education in grades K through 8 at St. Thomas. At the present time, I spend three days a week teaching at St. Thomas, and two days a week teaching at Sigsbee.

8. When I was assigned to the Shared Time program I was aware that I would be teaching in a Catholic school as a public school employee. This did not cause me any particular concern. I wanted to be in another school but they explained that they needed me at this school. I agreed to accept this position without any reservations, and have not had any problems with the assignment, religiously or otherwise.

9. It was my understanding when I was assigned to the Shared Time program that there were to be no religious artifacts or symbols in my classroom. The bottom line was that whatever we did in the public schools, that is what we did in the Catholic schools. I was not to conduct myself any differently than if I were teaching in a public school. The purpose of this program is to teach children physical education regardless of what their religious background may be.

10. I was assigned to this position by my supervisors Joe Leonardo and Tootie Wagner. The Catholic school was

in no way involved in my assignment, so far as I am aware. That is, before my assignment, I was not required to attend any interviews or the like.

11. The curriculum which I follow for each grade level is prescribed by the Grand Rapids Public Schools. The materials and equipment that I use are all provided by the GRPS.

12. St. Thomas has an athletic program, but they do not use any of the equipment provided by the public schools. They have their own equipment. In fact, the GRPS property is stored separately from the athletic program equipment.

13. The principal at St. Thomas has had nothing to do with the program I teach, nor do the teachers at St. Thomas.

14. The gymnasium I use is all by itself in a separate building. The children have to put on their coats in the winter time to go from the classroom building to the gymnasium.

15. I am not involved as a coach in any of the team sports provided by the athletic program of St. Thomas.

16. It is my understanding that the plaintiffs in this action have suggested that an acceptable alternative to the Shared Time program for non public school students would be to provide the shared time services at some other location than the nonpublic schools. This would not, in my judgment, be feasible in this instance, due to the time it would take the students to walk to the nearest public school, which is three blocks away. In addition, the nearest public school, which is Sigsbee, would not have enough hours of the day or rooms available to use for these students.



17. I grade my students on a report card provided by the Grand Rapids Public Schools. The grade is recorded and then communicated to the students parents through the mail. In addition, I keep attendance records in a record book provided by the public schools.

18. I keep a running inventory of the materials I have been provided with through the Grand Rapids Public Schools. I am the only one that uses the equipment provided through the public schools.

19. The nonpublic school teachers and principal have nothing to do with what I teach. The principal at St. Thomas has never tried to encourage me or influence me to incorporate religious matters into the course. I feel no type of personal pressure by virtue of the fact that I am teaching in a Catholic school.

20. As I recall, the topic of religion has come up only once. It was Ash Wednesday and all the kids came to gym with dirty foreheads. I didn't know what that was for and asked "How come everyone is dirty?". They told me it was Ash Wednesday and then I realized. Other than that experience, the topic of religion has never come up.

21. I understand the plaintiffs in this case claim that there is going to be an inter-mixing of religion and education in my classes. I do not believe that the things that are going on in my physical education classes have anything to do with their religion, my religion or anybody else's religion. Further, with respect to the issue of administrative lines of authority, my supervisors are Joe and Tootie, not the nonpublic school personnel. The administrative lines of authority are clear and distinct. The nonpublic school principal has never tried to "cross that line".

22. On occasion the nonpublic school personnel have observed my physical education class. For instance, the other day we were playing floor hockey and another teacher wanted to see how that was done in the gym and what they do. He just wanted to observe the class.

23. I do not attend any faculty meetings at St. Thomas.

24. I cannot perceive a religious atmosphere at St. Thomas. However, even if one was to assume the atmosphere to be religious, that atmosphere has absolutely no import of how or what I teach.

25. There are no religious symbols in the gymnasium at St. Thomas.

26. I consider the gymnasium to be a public school classroom during the period of time I am there and I consider the students to be public school students during the time I am there. I am at all times a public school teacher. I have no duties or responsibilities at St. Thomas outside of my job as a shared time teacher.

27. I think the Shared Time physical education program is great. I know that if the nonpublic schools did not have this service children would have a physical education consultant maybe once a month or maybe once every two months. Through the Shared Time program they are getting a really good physical education.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
Douglas Reahm, Music Supervisor:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools as a Supervisor of Music.

My residence is at 813 Walsh, S.E., Grand Rapids, Michigan in Kent County.

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3. I am a caucasian and a member of the Protestant faith.

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7. In 1976, the Shared Time program began to be discussed as a part of the Music Department offerings and in 1977 our first shared-time school in music was implemented. In the 1981-1982 school year we have twenty-five (25) nonpublic schools in which we provide music services and the equivalent of approximately 6.8 teachers who work in those schools.

8. In my present position I am responsible for a variety of administrative tasks. I interview prospective music teachers and recommend hiring to the Personnel Office; I prepare budgets and administrate the financial end of the purchase of all equipment and materials used in both the public and nonpublic schools with regard to music; I prepare in-service programs for all music teachers; and I evaluate all shared time music teachers.

9. With respect to instructions given to new or present employees who will work in shared time schools, I give oral instructions that they are to service those schools exactly the same way they would service a public school. I direct the staff to follow the same curriculum in the nonpublic school and the public school. Teachers are advised that during the time they are in the nonpublic school they are a public school teacher and the students are public school students. Music teachers are to act and make decisions as public school teachers. It is a practice in our department that all teachers serve an "apprenticeship" in the public school program (with some exceptions) so they are aware of its operation and demands

so when they move to the nonpublic school setting, they are fully aware of the expectations. Each year in the fall we discuss these expectations with our shared time teachers.

10. The Music program we offer is from kindergarten through 12th grade and is in the vocal music area. We have no program in instrumental music.

11. The elementary program is described by a set of elementary objectives that were adopted in June, 1979 and are made available to each music teacher as well as each classroom teacher in both the public and nonpublic schools at the elementary level. That objective book is attached as Exhibit 1 and incorporated herein by reference. In the secondary program we are in the process of developing objectives and have a preliminary draft that has been in the hands of all music teachers since the fall of 1980. A copy of an updated draft is attached as Exhibit 2 and incorporated herein by reference.

12. It is the intent of the music program to give the students a broad, general background in the discipline and the art of music. Study of singing, musical instruments, listening, music reading and movement activities are an integral part of the program at the elementary level. The secondary level program in junior high is aimed at a continuation of the general music program and also may include some performance groups. The senior high program is essentially a music performance oriented activity. I have been told that many of the schools which we serve did not have a music program prior to the implementation of the Shared Time program.

13. The music curriculum of the shared time schools is the same program as the public schools. In the elementary, a music teacher writes out a lesson plan that is duplicated



and given to all classroom teachers, be they public or nonpublic. Virtually, the same lesson is taught in each school. Vocal music which has a religious text is a major portion of the realm of fine music. Teachers are free to use such texts in both public and nonpublic schools but are told not to explicate the text. The materials used in the program are purchased by the Grand Rapids Public Schools and so marked. These would include books, records, autoharps, resonator bells, pictures, music and any other necessary materials.

14. The Grand Rapids Public Schools Music program is made available to all students. We describe the type of program we are able to offer and if they (the student's school of primary attendance) wish to opt into the program, we then make accommodations to do so. As in the public school elementary program, it is virtually every child in grades K through 6 in the non-public schools which we service.

15. Shared time teachers in both public and nonpublic schools are under the immediate and direct supervision of my office with regard to schedules, times, evaluation and financial matters.

16. As a matter of normal course of action, I visit music teachers in both public and nonpublic schools to assess the program they are teaching, sometimes reviewing their lessons and also observing them teach. My usual procedure would be to arrive at a building and let the school secretary know I have come to observe the music teacher. I enter the room and take copious notes on the activities I see. I may then speak with the teacher and return to my office and write up the observation. The observation is sent to the teacher and we may at either the teacher's or my request get together and have an indepth discussion of the observation.

17. My contacts with nonpublic school principals are generally limited. Their office knows that I am in the building. They often offer comments concerning the value of the program or the teacher which the public schools have provided. Generally, there is no attempt on the part of the principal to exercise any supervisory function over music teachers. On occasion music teachers have contacted me with concerns that the school wanted to do a Christmas program or prepare for some other program that might have religious overtones. My instructions to those teachers are that they may use any text including a religious text they would feel comfortable using in a public school. We use religious text music in most of our public schools and so I see no reason to do anything different in the nonpublic schools.

18. Music teachers K-8 are scheduled into the nonpublic schools through the Music Office. The principal of the nonpublic school sends the Music Office a description of the number of classrooms and possible conflicts and suggestions for days of the week that might schedule best. A master schedule is made in concert with the Art and Physical Education Supervisors. This scheduling is done at the same time the public schools are scheduled.

19. Although I have had occasion to talk with almost every principal of the schools we service, we have never had a discussion of any religious matter nor have I felt that any pressure has been placed upon me to alter, change or consider modification of the music program on the basis of religious considerations.

20. It is a requirement of the public schools teachers' contract that classroom teachers remain in the classroom during music instruction. We encourage them to participate in the lesson, singing the songs, participating in movement activities and observing what the music teacher does in order



to reinforce in the minds of the students the value of the class. Also, they become better acquainted with the goals and objectives of music and some of the methodology for making it applicable in the classroom. Each of those classroom teachers receives a lesson plan from the music teacher which contains an outline of the activities the music teacher will perform during the music period plus suggested activities for classroom teacher follow-up during the week.

21. Most of our music programs occur in a designated room, which is used for music during the time we are there. There may be some conditions in which a music teacher would move to a regular classroom, depending upon the availability of rooms in the school or possibly the age of the children to be served. I am sensitive to the issue of religious symbols in the school and make a special observation to insure such symbolism is removed from those rooms used specifically for the Grand Rapids Public Schools music program.

22. Although I realize I am entering a school, which on many occasions is in existence because of a coalition of a religiously minded group of people, I do not feel the religious basis of the school has affected my work in carrying out the activities I feel I must perform with regard to the supervision of a vital instructional process. The religious atmosphere that may exist in the school, has not been a detriment to the work of either myself or my subordinates to my knowledge.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
Helen Bradley, Music Teacher:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools as a Music teacher. I reside at 430 Alger, S.E., Grand Rapids, Michigan.

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3. I am a caucasian and a member of the Methodist Church.

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7. My duties as a general music teacher have included participation in the Shared Time music program since 1979. At the present time I am providing teaching services at Ottawa Elementary (a public school), Madison Elementary (a public school), St. Jude's (a nonpublic school) and Blessed Sacrament (a non-public school). Approximately 3/5 of my time is devoted to the teaching of full time public school students, and 2/5 of my time is devoted to the teaching of public school students who also attend nonpublic schools.

8. My assignment to the Shared Time program was dictated by my supervisor, Mr. Doug Reahm, the Supervisor of Music. The fact that I was being assigned to religiously-affiliated schools to teach a portion of my time did not cause me any particular concern as a public school employee, or as Methodist. I enjoy teaching music and provide the same music instruction no matter what the particular setting in which I provide those services.

9. I have been specifically instructed by my supervisor that in everything I do, I must conduct myself as a public school employee, providing a public school music curriculum, utilizing supplies and materials made available through the

Grand Rapids Public Schools. All of the books, texts and the like which I use in providing the services are appropriately labeled as public school property.

10. All of the music instruction which I provide at both of my nonpublic schools is provided in a room, appropriately designated as a GRPS facility. There are no religious symbols or artifacts contained in either of the rooms where I teach at St. Jude or Blessed Sacrament.

11. As a public school employee, I follow the GRPS work calendar. If for some reason there is a conflict in the schedule in which my nonpublic schools are in session and the GRPS are not in session, I do not teach on those days.

12. I do not issue any grades for any of my students. I do not keep any record of their religious affiliation although I do keep very precise attendance records, which are kept in a book made available by the GRPS.

13. I am periodically supervised and evaluated by my supervisor, Mr. Reahm. Basically, Mr. Reahm follows the PEP evaluation procedure which has been adopted by the Board. Under that procedure, Mr. Reahm on a periodic basis will visit my classroom, unannounced, to observe my teaching performance in the classroom setting. After my classroom work is completed, we will normally discuss the written evaluation, before that evaluation is forwarded to the Personnel Department. No nonpublic school administrators/teachers have ever been involved, so far as I understand the situation, in the evaluation procedure which Mr. Reahm uses. From my point of view, there is absolutely no confusion or entanglement of administrative lines of authority — Mr. Reahm is my only supervisor. As a public school employee I am responsible to him for the way in which I conduct myself and my classes.

14. Because I am a public school employee I do not attend any faculty meetings at either St. Jude or Blessed Sacrament. I am not in any sense of the word a member of their respective faculties.

15. Although I do recognize, by the name of the building in which I teach, that some of the students may be affiliated with the Catholic Church, neither the religious affiliation, if any, of my students, nor the religious affiliation, if any, of the regular classroom teachers in those schools has ever in any way affected or impacted what I teach or how I teach it as a music teacher. I have not personally felt any pressure or influence of a religious nature which has in any way made me feel uncomfortable teaching in the nonpublic school setting.

16. As I see it, the basic function and purpose of the music program is to provide a very detailed, wide curriculum to provide the students with a basic understanding and appreciation for music, as an important discipline in their educational pursuits. The music program of the GRPS has a great many things to offer which would not, in my judgment, be otherwise available in the nonpublic school setting. I teach children music. Part of the music instruction also includes preparation for performances, usually twice each year. The nature and type of materials which I use in my music programs does not differ in the school settings where I teach. That is, I will use the same materials in my non-public schools as I use in my public schools.

17. I have been advised that the plaintiffs either have or may be arguing that the services which I provide could be as easily or effectively provided off-site, as opposed to on-site, in the leased premises context. In my judgment, from an educational point of view, that particular arrangement would not be as effective. A good deal of important and valu-



able instructional time would be lost in transporting students. It only makes sense, in my view, to move one teacher, as opposed to 30 students. My students would lose a great deal if the manner in which the program were altered, as suggested by plaintiffs.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
Vee Matusko, Art Supervisor:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools as Supervisor of Art, in charge of the Art programs at the elementary, middle school and senior high levels. I reside at 7596 Hessler, in Rockford, Michigan.

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3. I am a caucasian and am not affiliated with any particular religious faith.

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8. In the 1977-1978 school year, Art was first offered and made available to children attending nonpublic schools. For the present school year, 1981-1982, the Shared Time Art program is being offered on premises leased by the Grand Rapids Board of Education as public school classrooms at 27 nonpublic school sites. Of course, my duties and responsibilities as Supervisor of Art were extended following the implementation of the Shared Time Art program. My duties and responsibilities with respect to the art teachers, most of whom teach in both the nonpublic and the public school setting, are the same.

9. The Grand Rapids Public Schools curriculum for Shared Time Art students is taught from grade level K through 8. Although my supervisory responsibilities include grades K through 12, there are no high school nonpublic school students receiving Art through the Grand Rapids Public Schools.

10. If art openings arise, I am normally involved in the interviewing process in order to screen and recommend to the Personnel Department those individuals who would be best suited and qualified for such openings. The actual authority to hire and/or fire resides with the Personnel Department, to whom my recommendations are made.

11. Most of the art teachers under my supervision teach in both the nonpublic and public school setting. In light of the peculiarities which can arise in the nonpublic school setting, I have periodically reinforced with my teachers the fact that they are to conduct themselves at all times as public school teachers, providing teaching skills in accordance with the curriculum guides of the Grand Rapids Public Schools. I am sensitive to the issue regarding religious symbolism and my teachers have been told that such symbolism should be removed from the classroom during the period of time that they teach Art. My teachers are told that the rooms in which they teach should be clearly designated as public school property. I also emphasize to my teachers that they are my responsibility and accordingly, nonpublic school administrators have nothing to do with my teachers' supervision, evaluation or assignment.

12. When the Shared Time Art program is offered to any students attending nonpublic schools, before the nonpublics accept the program, I specifically meet with the building principal in order to go over what the program consist of, emphasizing that it is a public school program, following a public school curriculum, taught by a public school teacher.



I like to explain the program at the outset so that it is clearly understood at the beginning that I will be responsible for the implementation and operation of the program, and not them.

13. So far as I am aware, very few of the nonpublic schools where shared time art is now being offered ever before had a well defined, goal oriented, art curriculum. Indeed, in many instances, such schools did not have any art program whatsoever.

14. In terms of course content and teaching methodology, the nonpublic school administrators have not in anyway interfered with any of my teachers. I like to think that part of the reason for this non-interference is the fact that I take the time to explain the program at the outset, in order to avoid such problems. My teachers as well as the nonpublic school administrators clearly understand that with respect to the art teachers, I am their "boss".

15. In connection with the initial meeting with the nonpublic school administration, I usually also require a tour of the building and at that time explain to the administrator the fact that we must have a room free of religious symbols, and the fact that we must be supplied with a lockable cupboard in which to keep Board of Education supplies. In my experience, most nonpublic school administrators have been very cooperative in complying with those requests.

16. In most of the nonpublic schools where my teachers provide art services, a special room is designated for use as a public school art room.

17. The nonpublic school administrators have absolutely no input into the teacher assignment process. I am solely responsible for assigning and then supervising those who teach art in the Shared Time program.

18. The purpose of the Shared Time Art program is to provide an opportunity for as many children as possible to be exposed to a quality art program so that they may have exposure to a "total education", one which enables them to experiment with their own individuality and creativity. In my view, art is basic to educational development. I feel that all children, no matter what their religious background, should be exposed to the program which is offered by the Grand Rapids Public Schools. The program itself has nothing to do with religion whatsoever.

19. All of the materials and supplies which are used by my art teachers are requested through and purchased by the Grand Rapids Public Schools. We have an established ordering procedure which each teacher must follow in order to obtain the supplies needed to provide his/her teaching services. The same procedure applies to all programs whether conducted on Board of Education owned or leased premises.

20. In my view, the entire art program is designed to benefit students, and students only.

21. As supervisor, I am responsible for periodically evaluating the art teachers that provide shared time art. Generally speaking, I follow the same basic procedure in each instance. When visiting a given building, I first make my presence known to the administration of the school and then proceed to the classroom in order to observe the teacher in the classroom setting. Following such observation, I prepare a written evaluation which is then later discussed with the teacher and forwarded to the Personnel Department for filing in the permanent file of that teacher. As far as I am concerned, the nonpublic school people have absolutely nothing to do with the evaluation process, which is my sole responsibility. I do, however, make myself available to non-public school administrators should they wish to discuss the program itself, at any time.

22. I am not aware of any attempts on the part of the nonpublic school authorities to either supervise my staff, or attempt to religiously influence or pressure them. Certainly, as supervisor, I have never personally experienced any religious influence or pressure being directed toward myself. My experiences have been very positive and the nonpublic school administrators have been most complimentary of the services provided. Whatever religious atmosphere may exist within any of the nonpublic schools where shared time art is provided, it has not in any way affected, so far as I am aware, my Art program or personnel.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
Lorrie Strand, Art Teacher:**

1. I am presently employed by the Board of Education of the Grand Rapids Public Schools teaching art to grades K through 6. I split my time between Dickinson Elementary, Riverside Elementary, St. Alphonfus, and St. Michaels. Dickinson and Riverside Schools are public schools, and St. Alphonfus and St. Michaels are nonpublic schools.

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4. I am caucasian and a non-practicing Methodist.

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7. I have been teaching art in the shared time program of the Grand Rapids Public Schools since September 1981. At the present time I am at Dickinson School on Mondays, at Riverside on Tuesdays and alternate Fridays, at St. Alphonfus on Wednesdays and Thursdays, and at St. Michaels on alternate Fridays.

8. I was placed in the Shared Time program by my supervisor, Vee Matusko. So far as I am aware, Catholic schools did not have any input in my assignment.

9. The fact that I was going to be teaching part-time at a catholic school caused me no concern whatsoever.

10. I was specifically told to conduct myself in the nonpublic school setting the same as I do in the public school setting. I understand that the nonpublic school principals or teachers have no duty or responsibility over what I teach or how I teach it. In terms of curriculum, I cover the same basic areas in art education at both public and private schools. The objectives for the grade levels that I teach are prescribed by the Grand Rapids Board of Education.

11. My supervisor V. Matusko is responsible for organizing my schedule as far as which days I will be in which school. In terms of the work calendar, I follow the Grand Rapids Public School calendar. In other words, if the nonpublic schools are in session and the public schools are out of session I do not work.

12. St. Alphonfus has been receiving art instructions through the public schools for four or five years. St. Michaels just started in the program this year. I teach grades K through 6 in both schools.

13. I keep no record of the religious affiliation of any of the students which I teach, nor do I grade any of my students. I do keep attendance records in an attendance book provided by the Grand Rapids Public Schools.

14. It is my understanding that the plaintiffs in this action have suggested that an acceptable alternative to the present Shared Time program for nonpublic schools students



would be to provide the shared time services after the regular school day or at some location other than the nonpublic school. Based upon my education and background, I believe there is a territorial essence in learning that is important. The children know their own space and have some security in that space. Simply from that point of view it would not work. In addition, there is the travel time the students would lose. Further, it is critical that I as a support staff person have contact with the teachers, the principals, and the building, to sense what it is the students need. I have to fit in what I am going to intergrate with the rest of their line programs. This cannot be done if you take the child out of his/her school. It is expensive and it does not work well.

15. My function, as I perceive it in teaching art to my nonpublic school students or any students, is to keep children's curiosity and imagination alive. As much as I can I try to keep alive that part of their brain which is normally dulled by the learning-answer stuff. Also I try to teach them to look and see, to feel better about themselves and their individual awareness, to feel good about themselves and that they can make something out of themselves. I try to teach them to respect each others creativity. I am teaching them to appreciate beauty in the world.

16. The art supplies I use, I order from the Grand Rapids Public Schools. All the supplies are labeled as Grand Rapids Public Schools property and are kept locked in either cabinets or my room.

17. My performance as a teacher is evaluated by my supervisor, Vee Matusko, she comes into my classroom unannounced and observes a class. None of the nonpublic school principals at either school, have ever asked to sit in on any of my classes.

18. I have not attended any faculty meetings at the nonpublic schools. None of the nonpublic school personnel have ever attempted to influence me in what I teach or encourage me to incorporate religious matters into the content of the subject area that I teach. I have not felt compelled to do anything of a religious nature.

19. To the extent that I perceive a religious atmosphere in the two nonpublic schools, it does not effect what I do. I do not attempt to engage these youngsters that I work with in any discussions about their religion or mine. I do not include it in my instructions nor in the themes of my work. I have no influence nor do I attempt to exert any influence on their religious background.

20. I understand there is a concern on the part of the plaintiff to this lawsuit that due to the fact that public school teachers are going into nonpublic schools the administrative lines of authority are going to become entangled or intermixed. I have never experienced any confusion concerning the lines of authority between me and my supervisor, nor between what authority any principal has over me when I am in their building. In my case, I am responsible for what I teach and how I teach it only to my Grand Rapids Public School supervisor.

21. I think the shared time program is a worth while program. It is helping children regardless of their religious affiliation. It is great for the children, it is good for our community, and it is good for our country. I think it is a fantastic program. I think it is excellent that teachers in a parochial school can see what teachers in our public school are like. I think it is good for the community, the parents and the children to have some contact with me as a public school teacher. We are trying to provide the best educational op-



portunity for all the youngsters in the Grand Rapids area that we can possibly provide within the law.

[Jurat and signature omitted in printing]

**Excerpt from the Sworn Offer of Proof of Mnsgr.  
Herman H. Zerfas, former Superintendent  
of Grand Rapids Catholic Schools:**

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8. In the more than three decades that I have been associated with the Catholic School system there have been dramatic changes in the image and the substantive structure. With no intent of being judgemental, the earlier Catholic schools were totally taught by Sisters and guided by what the Pastor said. This was the school I attended as a child. Currently, Catholic schools are administered and taught mostly by lay persons. They are probably the most democratic schools in the world, governed by the will of the parent patrons, who articulately express their will informally through the enrollment of their children, formally through the elected Parish Board of Education. Typically, the principal of the school is the executive officer of this Board, responsible for the implementation of its policies. The Board's actions on finances are subject to the review of the Parish Council, also regularly an elected body. Among its duties is the recommendation for the financial support of the parish to supplement tuition income for the operation of the school. The Pastor's chief business role is as administrator of the entire parish. The whole Grand Rapids diocesan system of schools came under the direction of an elected Diocesan Board of Education, with all other boards of education having a subsidiary relationship. With the sponsorship of the Diocesan Board there has been developed a manual of policies and administrative procedures, to guide the total educational enterprise.

9. A similarly important change is to be found in the admissions policies of the Catholic schools. Earlier schools were exceptional if there was even one non-Catholic student. This was not consequent so much on formal policy as on administrative attitudes. There was no perception of being a school for other than Catholics. Now these schools are sought by others, and these others are regularly accepted without religious adherence being the criterion. The result is that some Catholic schools have a pupil population more than ten-percent non-Catholic; one school has more than forty percent non-Catholic. The admission of minorities is even more dramatic. Catholic schools are by and large neighborhood schools. As a result, the Grand Rapids Catholic system has one school that is about twenty percent Black and another that is about forty percent Black. The latter also has a significant number of Spanish-speaking pupils.

10. The approach to teaching religion has also changed. Formerly, it was inculcation, often by rote memory and required practices; now it is exposition with a strong appeal to reason. The former was authoritarian with a prominent appeal to the "definitions of the Church", the latter is based upon an "authority of competence" within the teaching ministry of the Church, with an appeal to personal perceptions and individual conscience. Catholic schools, therefore are not severely sectarian. There is no "Catholic" algebra, chemistry or language. Academic texts meet the standards of the most demanding scholarship; almost all are in use in the public schools. The individual Catholic schools are challenged to develop as a "community of Faith" directed to making literate and committed Christians who care for one another, their Country and mankind at large.

[Jurat and signature omitted in printing]

**Excerpt from the Sworn Offer of Proof of Ronald J. Cook,  
Superintendent of Grand Rapids Catholic Schools:**

1. I am the Superintendent of Schools for the Roman Catholic Diocese of Grand Rapids. My name is Ronald J. Cook and my administrative responsibility includes overall supervision for the elementary and secondary Catholic schools in this eleven county diocese. Within the School District of the City of Grand Rapids there are 19 elementary and 2 secondary schools with 6,233 students in attendance.

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4. As Superintendent of Schools of the Diocese of Grand Rapids I have become familiar with the operation of the Catholic elementary and secondary schools of the diocese and, of course, particularly those within the Grand Rapids School District. Within the Grand Rapids Public School District, the public schools are under the jurisdiction of the Grand Rapids Board of Education.

5. In my position as Superintendent of Schools for the Diocese of Grand Rapids I am familiar with educational instruction made available to students attending Catholic elementary and secondary schools in Grand Rapids under various shared time offerings. These shared time classes are provided through the Grand Rapids Board of Education at public schools and in leased classrooms controlled by the public schools in non-public schools as well as at other sites.

6. The shared time classes provided by the public schools are largely either remedial or enrichment courses. Prior to the establishment of these programs, the Catholic schools under my jurisdiction lacked the financial resources to provide these classes to the students who now benefit from them. If the shared time classes were no longer available to qualified students attending Grand Rapids Catholic Schools, the Catho-

lic schools would very likely not have the financial resources to provide these remedial and enrichment courses on their own.

7. For the most part, the shared time instruction presented by the public school in Catholic schools in Grand Rapids consist of physical education, remedial mathematics, remedial reading, art and music. Some foreign language classes are also presented on a limited basis. These classes did not replace any similar classes formerly presented in such schools theretofore by the Catholic schools, except for former physical education courses in high school. None of these shared time classes have any religious content nor is any effort made by the public school teacher to introduce any religious bias or belief. The courses are not part of the essential curriculum of the Catholic schools and are not necessary credits, other than physical education, for any student to graduate from high school. Grand Rapids Catholic schools have a full complement of courses as required by accrediting agencies to issue accredited diplomas to children in attendance at the Catholic school classes without reliance upon any credits obtainable from attendance at the shared time classes. As I have previously indicated, should the shared time classes be withdrawn it is unlikely, in fact highly improbable, that the Catholic schools would replace the deleted public school classes with substitute classes in the same subjects under Catholic school auspices. The institution of these shared time classes did not arise out of any crisis or institutional need of the Catholic schools. Rather they were conceived by the public school Board of Education as a means of providing students, who were children of resident taxpayers in the community, with remedial and enrichment educational offerings which they would otherwise not have available to them.

8. Catholic schools have existed in Grand Rapids since this community was initially settled well over 125 years ago.



That heritage will not cease whatever the outcome of this litigation. We welcome the participation of our school children in shared time classes provided by the public schools since such classes undeniably benefit them. We also speak for them in seeking to maintain those benefits. At the same time, the Catholic schools of Grand Rapids are not dependent upon these shared time programs and will survive whatever the outcome of this case and will not cease to speak for its school children in their rights to equal treatment and justice.

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#### PURPOSE OF CATHOLIC SCHOOLS— INTEGRITY OF SECULAR INSTRUCTION

10. The Catholic elementary and secondary schools under my jurisdiction in the Diocese of Grand Rapids seek to develop the whole person and herein lies the specific Catholic nature of the school. A document issued in 1977 by the Sacred Congregation for Catholic Education of the Vatican has this to share regarding the integration of faith and culture: "In helping pupils to achieve through the medium of its teaching an integration of faith and culture, the Catholic school sets out with a deep awareness of the value of knowledge as such. Under no circumstances does it wish to divert the imparting of knowledge from its rightful objective." (*The Catholic School*, March 19, 1977). Thus, above all other concerns, these Catholic schools seek to educate their students fully and soundly so as to prepare them as capable and participating citizens in society.

11. The Catholic schools in the Diocese of Grand Rapids differ from the public schools, which have a comparable central educational purpose of preparing students for capable citizenship, in that (1) instruction in Catholic schools in religious education classes is part of the regular school day

and that, (2) value laden questions on moral matters are examined in academic subjects in a religious context when those questions are pertinent to the subject matter being discussed. That is not done in public schools.

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13. As professional educators, however, the personnel at work in Catholic schools do not permit the distortion of the content of academic subject areas. Indeed, in the *Catholic School*, March 19, 1977, we read:

"Individual subjects must be taught according to their own particular methods. It would be wrong to consider subjects as mere adjuncts to faith or as a useful means of teaching apologetics. They enable the pupil to assimilate skills, knowledge, intellectual methods and moral and social attitudes, all of which help to develop his personality and lead him to take his place as an active member of the community of man. Their aim is not merely the attainment of knowledge but the acquisition of values and the discovery of truth."

The Catholic schools, under my supervision, strongly emphasize the integrity of each separate secular academic discipline without distortion or intrusion of unrelated religious issues.

14. The Catholic schools under my supervision offer both a secular education and a religious education during the regular school day. Specific Michigan Law requires elementary and secondary non-public schools to provide the same basic course of study or its equivalent to that provided by the public school district in which the non-public school is located geographically. Specific subject content is also prescribed by the legislature in General School Laws. The purpose of this



legislation is to insure that all students in schools in the State of Michigan are provided with a course of study which will prepare them for useful citizenship and to equip them with the skills and knowledge necessary for such citizenship. Indeed the Catholic schools under my jurisdiction do subscribe to the Common Goals of Michigan Education as published by the Michigan State Board of Education in 1980. However, Catholic schools provide this curriculum and adhere to these goals not solely because they are legally required to, but rather because to choose otherwise would be to fail in our responsibility to the students.

15. Two of the characteristics of the "profile" of church-related schools referred to in the *Nyquist* and *Levitt* decisions is that those schools were "an integral part of the religious mission of the church sponsoring" them and "have as their purpose the teaching, propagation and promotion of a particular religious faith". I would strongly deny that Catholic schools in Grand Rapids exist solely for such narrow parochial or sectarian purposes. The mission of these schools is clearly as much education and social as it is religious. The facts herein recited concerning the Catholic inner city schools verify this.

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20. This is best illustrated by the situation presented in the Catholic schools in inner city Grand Rapids. Over the last two decades these inner city schools have increasingly operated in areas where the Catholic population has shifted in large proportion to the suburbs. Nevertheless, these schools have continued to provide for their communities even though the student population has become increasingly less drawn from Catholic families. In consequence, the minority proportion (i.e. Black, American Indian, Hispanic and Southeast Asian) in the 12 inner city Catholic schools in Grand Rapids

has now risen to 12% of the student population. Those not of the Catholic faith in such schools represent 15% of the student body. Locally, the statistics vary with the neighborhoods where the schools are individually located. For example, in one school, St. Andrews, the minority student population is approximately 50% of the students attending, while the proportion of students at that school who are not Catholic exceed 42%.

#### ATTENDANCE AND PARTICIPATION IN RELIGIOUS INSTRUCTION AND SERVICES

21. Parents who enroll their children in Grand Rapids Catholic Schools are advised in advance of the religious aspects of the school program. They understand that the curriculum and program of the school includes religious instruction classes and periodic religious services. Parents of Catholic commitment ordinarily desire their children fully to participate and experience such classes and services. Many parents not of the Catholic faith who enroll their children in Grand Rapids Catholic schools also want their children to participate in these classes and services. It is the policy of Grand Rapids Catholic Schools ordinarily to require students to attend religious instruction classes and religious services either at the Catholic school or at the church of his own faith if the student is not Catholic.

22. Catholic schools in Grand Rapids typically include some form of prayer or religious observance during the normal school day. This could be as simple as a prayer recited at the start of the school day. It might also include occasional attendance at religious services, usually weekly, or on days of special religious significance. Religious services are not a daily occurrence in any Grand Rapids Catholic School. Students in the school are expected to be present during such

religious observance although students not of the Catholic faith are not required to attend if their parents so request. The degree to which any individual student (whether Catholic or non-Catholic) participates in religious classes or services personally is a matter of his own free choice based on his own conscience.

### DOMINANT PURPOSE — THE QUESTION OF RELIGIOUS INCULCATION

23. Nor is there any attempt to inculcate specific religious or moral values on the students in the schools under my supervision. Incultation suggests a "grinding in" or specific ideas to students who are reluctant to accept them. It contains an element of coercion. This coercive element is simply not present in our schools. Indeed, it is foreign to present day Catholic philosophy of education and to the modern operational procedures of our Catholic schools.

24. This is not to say that values are absent from our schools any more than they are absent from public schools. Secular subjects on occasion, of necessity, touch upon questions of morals and values. It is simply that Grand Rapids Catholic schools approach value laden questions directly throughout the entire curriculum in a manner designed to make students aware of their own responsibility to develop a set of values that will serve them well in their future roles as citizens. In practice much of the content in religion classes is not narrowly sectarian at all. In fact, particularly in the Catholic schools located in the inner city where the student populations will include significant numbers of non-Catholic students, there exists particular sensitivity for the religious beliefs of all students, both Catholic and non-Catholic. No effort is made in the schools under my jurisdiction to force any student, Catholic or non-Catholic, to accept the teach-

ings or participate in the religious services of the Roman Catholic Church. To do so would be a violation of our trust and our tradition because we, as Catholics, believe that faith is a gift freely given by God and it is not possible, therefore, to force what must be freely given and freely accepted on another human being. Thus, schools under my supervision do not require obedience by students to the doctrine and dogmas of the Roman Catholic Church nor have as their purpose to any degree the "incultation" of religious values as the *Nyquist* decision presumes of stereotype church-related schools. Through instruction, students will better understand the various value choices available to them. After examination and discussion, students will each themselves make a free choice and sometimes a life-long commitment to various value structures.

### CONTROL OF CATHOLIC SCHOOLS

25. The Catholic schools located in the Grand Rapids Public School District each have their own Board of Education which operates pursuant to a written constitution. Members of each of these Boards are elected by parents and others in the parish with which the school is associated. Board members in each of such Boards are lay persons although generally the pastor of the parish will serve ex-officio as well. Board members need not be of the Catholic faith and, in fact, persons of religious faiths other than Catholic serve on existing Boards operating Catholic schools in the Grand Rapids School District. The day-to-day operation of Catholic schools is subject to the policy established by action of the Board of Education of each school. Thus, the principal of a given school reports to his or her Board of Education concerning school matters. These Boards meet regularly and are responsible for the operation of their respective schools. General diocesan policy concerning the operation of such schools is



complied with under the terms of each school's constitution. But the implementation of such policy and adoption of individual policy concerning each school for day-to-day operation is vested in and effectuated by the Board of each school. It would be inaccurate, therefore, to assert that these schools "are controlled by churches or religious organizations" according to the *Nyquist* stereotype of a church-related school.

### CURRICULUM

26. School programs in the Catholic schools of the Diocese of Grand Rapids are organized in such a manner that the curriculum contains every course required by law by the State of Michigan plus additional courses in religious instruction. In keeping with the fundamental principle of Catholic education to educate its students soundly and fully in secular subjects, the curriculum of the Grand Rapids Catholic schools are not narrowly or exclusively religious.

27. As stated earlier, these academic courses have their own basic integrity, and it would be improper under our philosophy of education to impose religious restrictions or otherwise interfere with the basic integrity of those disciplines. It cannot be appropriately stated of the Grand Rapids Catholic schools, as *Nyquist* perceived church-related schools, that these schools conduct their operations, curriculum, and programs to fulfill a purpose of propagation of the Catholic religious faith. The curriculum of the Grand Rapids Catholic Schools are not narrowly sectarian, i.e. Catholic, nor exclusively religious. They provide the broadest secular educational experience available in the community while integrating that experience, compatibly and with participation only with consent, with a religious orientation when, and only when, that orientation is appropriate.

### RELIGIOUS RESTRICTIONS ON FACULTY APPOINTMENT AND TEACHING

28. The "profile" of church-related schools contained in the *Nyquist* decision describes such schools as "imposing religious restrictions on what the faculty may teach". Teachers are selected for our schools based upon their expertise in particular academic areas and they are expected to demonstrate competence in those areas. Within the general philosophical framework of the school, individual teachers have wide latitude in organizing lessons and providing instruction within their discipline. Our schools do not then impose religious restrictions on what the faculty may teach. Furthermore a teacher need not be of the Catholic faith to teach in our schools. In fact, we have a significant number of teachers of other faiths in our faculties.

29. In the Grand Rapids Catholic schools teachers (other than those teaching religious classes) who are lay persons, i.e. not clergy or members of a religious order of nuns, constitute 78% of the teaching faculty of those schools. 10% of those teachers are not of the Catholic faith. It is clear, therefore, that the criteria cited by the Supreme Court of a church-related school imposing "religious restrictions on faculty appointments" is inapplicable to the Grand Rapids Catholic Schools.

[Jurat and signature omitted in printing]

**Excerpt from the Sworn Offer of Proof of Sister  
Marie Michael, Principal of St. Andrews School:**

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2. St. Andrews School is operated by an elected Board of Education. Under the Constitution of St. Andrews School



membership of the Board of Education is made up of three representatives of the parish of St. Andrews, three parents of students attending St. Andrews School who are not parishoners of St. Andrews and three parents of students attending St. Andrews who are members of St. Andrews Parish. At present, the make-up of the Board of Education includes two members who are Black, one who is Hispanic and six Caucasians of various ethnic backgrounds. Three of these persons are not of the Catholic faith. Also serving on the Board ex-officio, without a vote, are the Pastor of St. Andrew's Parish, myself as Principal and chair person of the Education Commission of the parish.)

#### TEACHER HIRING AND RELIGIOUS ORIENTATION

3. It is my responsibility in carrying out the policies of the Board to hire, discharge or discipline teachers. Our criteria for hiring teachers is, of course, to require that the teacher be certified by the State to teach and have the proper credentials to perform the academic functions necessary to perform the teaching task. But more important than that, is to determine the teachers' dedication. We want to be certain that the teacher be concerned about the youngsters that she/he will be teaching, has the ability to work with people and to have something more than a superficial commitment to the philosophy of St. Andrews. In interviewing prospective teachers we share with them the St. Andrews' philosophy, which is that our school provides a program of total education of the whole person. We insist that if we meet the physical, social and personal needs of the individual student, educational quality will follow. We do not have any requirement that the teacher be of the Catholic faith nor do we require that the teacher make any personal religious commitment except that they accept our philosophy of education. We advise them that, from our standpoint, religion begins when the children

walk into the front door of our school by the manner in which they are treated. We want respect and consideration of each child for himself and from each child to everybody else, which we regard as the Gospel message. In point of fact, I do not inquire as to what a prospective teacher's religious beliefs are, although some teachers have, in applying for positions with our school, volunteered that they were not of the Catholic faith and inquired whether this presented a problem. I have consistently advised those applicants that it will only be a problem if they find the system that we are operating personally incompatible; not our problem with them or their religion. If they find themselves at ease with and compatible with our philosophy, then they are totally accepted as teachers, assuming they are competent to perform. All of those teachers, in fact, provide religious education to our students and that is whether or not they are of the Catholic faith.

4. We have 14 full time teachers on the staff at St. Andrew's School. Of our 14 teachers, 4 teachers are members of a Catholic religious teaching order (i.e. they are nuns); 10 teachers are lay teachers and of those 10 lay teachers, 3 are not of the Catholic faith. We do not concern ourselves with what any given teacher does with respect to the practice of their own personal religious belief. During the school hours the participation of teachers in religious services is entirely left up to them individually. It is what they themselves desire and wish to be comfortable with so long as they carry out our philosophy.

5. We make no requirements or demands upon our teachers concerning restrictions of a religious nature on the content of any instruction offered in secular subjects. We expect every teacher to provide competent teaching services within their own area of class content. We do, as an additional factor, expect every teacher to approach each child as an individual

and to look at each child for his/her personal needs. While, personally, I believe that to be a carrying out of the Gospel message, I see nothing particularly of a sectarian nature about such a requirement. It is, however, the philosophy of our school which the teachers understand and support.

### **CURRICULUM AND STUDENT ACHIEVEMENT**

6. We regard it as a necessity to provide the individual child with a total educational experience. Religion, that is, a belief in and understanding of God, is integrated where pertinent to the subject matter in any portion of that program. At the same time because of the make-up of the student population of St. Andrews it is appropriate and proper to integrate a study and understanding of various cultures, backgrounds and religions, (including race, culture and age) in the study of society. This is not, however, artificially introduced into any secular subject where it would be inappropriate or irrelevant to the question at hand. It should be understood that there are courses in religious studies which are separate from these secular courses. Certainly the secular course content of classes at St. Andrews is comparable with the course content and quality provided in the public school. In fact, students attending St. Andrews have compared very well in test comparisons. For example, our fifth grade students from St. Andrews measured at the top of their counter-parts in attendance at 18 schools in Title I areas in Grand Rapids, Michigan. Examples exist and are well known within the educational community in Grand Rapids of the achievements that have been made by students attending St. Andrews raising themselves from grade level 4 to 5 years below their grade of attendance to its equivalent within a space of several years. In short, it can be said accurately that students attending St. Andrew's School receive quality secular education.

### **STUDENT BODY AND ADMISSION POLICIES**

7. There are approximately 200 children enrolled in St. Andrews at present. We project 225 students for next year. Of the present 200 existing students, 69% are from minority groups: 47% are Black; 2% are American Indian; 1% are Oriental (Vietnamese); 19% are Hispanic (Cuban, Puerto Rican and Mexican-American). Of the remaining Caucasian, 31% of various ethnic groups are represented. Approximately 50% of the students are from families of various Protestant faiths.

8. No student has ever been denied admission to St. Andrews because of their religious faith, their race or their ethnic background. We are not interested in nor do we make any requirements concerning the religious belief or practice of their parents.

### **RELIGIOUS SERVICES AND INSTRUCTION**

9. Religious services are presented for St. Andrews' students generally once a week, although their availability varies from time to time. Approximately six times per year the whole school will attend religious services. If an individual student indicates that he or she does not wish to attend such services they are excused without penalty or remonstrance. In practice, most students do attend such services and, from what we are able to determine, are encouraged to do so by their parents. In any event, parents do not raise objection as a general rule to their children attending such services even though the family may not be of the Catholic faith. Parents are invited to attend those services when it is convenient for them to do so and, in fact, many of them do attend and support the availability of those services for students. The attendance of students at religious services does not present a matter of either friction or pressure



upon students or parents. The availability of such religious services is a part of our philosophy of total education and that is that God, and the recognition of God, is a part of total education.

10. No student attending St. Andrews is compelled to accept or believe in any doctrine of faith of the Catholic Church. For example, students who are not of the Catholic faith are excused from participating in religious instruction regarding preparation for participation in religious sacraments of the Catholic faith, such as Confirmation. It is our conviction that to compel any child to participate in such a sacrament or to require them to accept or obey a doctrine of the Catholic Church would be not only counter-productive but violative of our own beliefs. It is our conviction that religious faith is a gift of God and cannot be the product of compulsion. On the contrary, the personal decision of any individual student respecting the truth and compelling nature of any portion of any religious creed must be decided by himself in his own good time; it cannot be urged or pressed upon him and it is only in time that those decisions can be made with firm foundation.

11. As part of our effort to provide a total education we periodically present representations to our students from other religious and cultural backgrounds. For example, we have had ministers of various Protestant faiths and persons of the Jewish religion talk about their beliefs and about their cultural experiences. Periodically, we encourage our children to share with others in their classroom their own religious beliefs and cultural backgrounds with the purpose of encouraging them in a sense of self-worth and the desirability of supporting religious and cultural norms. Deep and long-lasting relationships develop between the students of diverse cultural, racial and religious backgrounds and between the parents of these students as a result of this process. St. An-

drews places great stress upon the family, upon the family of St. Andrews, upon the family of the supporters of St. Andrews and upon the family of each student. We stress to every possible extent, how much each of us needs one another. In respect to matters of religious concern, such as racial justice, treatment of the poor, bigotry and the treatment of other religions, we do not introduce such issues in a formal way into subject matter but rather allow them to develop through stimulating student exchange of views. We hope to teach our school children the principle of respect and consideration towards others with the goal of making them aware of the talents and gifts of their classmates.

12. The dominant purpose of our schools is to approach each child as of the ultimate importance as an individual regardless of his or her background, race or religious belief. While we believe this to be the fundamental principle of the Gospel, I would personally deny that pursuing such a purpose would be to engage in teaching, promotion or propagation of any specific religion in the school. In fact, an understanding of the religious truth of love and concern which is the Gospel message is what we seek to accomplish. That is done, not so much through concrete programs of expressed teaching but through providing assistance and witness to the child when that child needs it. In short, St. Andrews does not exist as some form of a recruiting outlet for the Catholic Church. We are dedicated to providing each child with the best possible education, an education that is totally integrated with secular subject matter, social understanding and religious orientation.

#### SHARED TIME CLASSES

13. Shared time classes are provided at St. Andrew's School for non-public school children in classrooms leased to the public schools and operated by public school teachers



under the control of the public school system. Those classes are in physical education, art for students attending pre-kindergarten through third grade; music for students in kindergarten through sixth grade; French for capable students in the fifth and sixth grade (3 days a week) and Spanish for grades one through three for capable students (3 days a week). In the school we occupy, space does not present a problem and, consequently, the shared time classrooms do not conflict with classrooms operated by St. Andrews. There are no religious symbols in the classrooms at St. Andrews which are leased to public schools. I am acquainted with public school teachers who provide the shared time classes at St. Andrews. This is on a simply friendly basis. They greet me in such a manner when occasionally we will meet on their coming or going from the school. Such teachers are entirely under the control of the public schools. They have no reporting relationship to me. I have no idea what the religious background or beliefs are of such teachers. I am not aware that any of them have ever taught in non-public schools. Certainly none of them taught at St. Andrews previously as a non-public school teacher.

14. All St. Andrew's students attend physical education classes; some attend art and music classes under shared time in addition. With respect to the French and Spanish foreign language programs of enrichment, participation in those classes are limited to those students who are capable of assuming those additional academic burdens without undue stress.

15. Students at St. Andrews attend no shared time classes at public schools. For a time it was considered that some program of providing shared time classes at public schools might be arranged for St. Andrew's students at the closest public school, Hall Public School. That school is located approximately a mile and one half to two miles distant from

St. Andrews. The idea was rejected as being impractical and counter-productive. The cost of transportation and the time for transporting children back and forth was viewed as requiring rejection of the idea.

16. The shared time classes provided at St. Andrews are of great assistance to our students. At the same time, it must be acknowledged that St. Andrew's School existed before the provision of such shared time classes and, I am very certain, will continue whatever the outcome of the litigation respecting the continuation of such classes on leased premises at St. Andrews. Shared time instruction did not stem from any need of St. Andrew's school for support or assistance. It is provided by the public schools to meet the needs of students. The additional prospective which these classes have given our children has provided them with significant personal opportunities.

[Jurat and signature omitted in printing]

**Excerpt from the Sworn Offer of Proof of  
Intervenor Parent, Clarence R. Covert:**

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6. Both of my daughters receive essential courses necessary for their graduation in the regular curriculum taught by teachers in the Sacred Heart School system. The public school class instruction which they receive in shared time classes are either remedial or supplemental to the regular curriculum taught by teachers in the Sacred Heart School system.

7. I am personally familiar with the shared time classes provided by the public school at Sacred Heart and with the teachers teaching those classes. I serve as a "room father" at noon two or three days a week and, consequently, am at

school considerably more than most people. I do not know what the religions of the public school teachers are who teach those public school shared time classes. The principal of Sacred Heart School advised me that he has no control or influence over the religion of the public school shared time teachers. The public school system selects which teachers they choose to teach those classes. There are no religious symbols in any of the classrooms where public school shared time classes are taught. The textbooks and materials used in those classes are free of religious content. In fact, even at Christmas time the art classes do not reflect religious themes in the art work they undertake.

8. Respecting attendance at the Sacred Heart Grade School, there is no requirement that students or their parents be of the Catholic faith. In fact, many of the students attending Sacred Heart School come from families which are of Protestant belief. In my opinion, it is not the school's place to mandate or impose a religious faith upon the child. I believe this is the parents' role.

9. There is one weekly religious service provided each week for students. The first four grades go on Tuesday morning and the last four grades on Thursday morning. In addition, on the first Friday of every month there is a joint religious service for all students. Attendance at these services is voluntary and a child can be excused if that is the wish of the parents. In fact, I personally am aware of one boy attending school at Sacred Heart who is not of the Catholic faith and I am informed that his parents have asked that he not attend the religious services. This is what has been done, with no difficulty.

10. In addition to a full curriculum of secular instruction there is a separate religious class which the children attend. Again, attendance is voluntary and, for example, this same

boy who I referred to in the previous paragraph, does attend the classes in religion at his father's request. These classes treat the subject of living the Ten Commandments, being honest, fair, etc., as moral issues. They also deal with understanding other religions. My wife has told me that this approach to religious teaching is sharply different from that which she experienced in her youth when religion classes in Catholic schools were much more concerned with "truths" of the Catholic faith and the errors of others.

11. To my knowledge, no child has ever been denied admission to Sacred Heart School because of race or religion. There is no discrimination between the students based upon religion or religious beliefs or practices.

12. Sacred Heart School is operated by a Board of Education consisting of nine members. These members are elected every year for a three year term each. These members are members of the Sacred Heart Parish. In this year's election process, there are seven or eight parishioners who are seeking election to the three seats.

13. Sacred Heart School is controlled by the Board of Education. The Board sets the programs, establishes codes of conduct, dress codes and other policy matters. If a parent is dissatisfied with some matter with respect to a teacher or class content, after taking the matter to the principal, the parent may bring it to the Board's attention for solution. The school is not controlled by the Pastor nor by any religious order. Parents, through their elected representatives on the Board, operate and control the school.

14. Thirty percent or so of the students in Sacred Heart School are from low income families. My children's school friends from various Catholic schools are Black, American Indian, Spanish-American, as well as Caucasian. Their reli-



gion is both Protestant and Catholic. Students at Sacred Heart School are taught in school that discrimination on the basis of race or religion is unacceptable.

15. Sacred Heart School is essentially focused around the family. The family must participate in the school if the children are to attend. The family must get the report cards, attend teacher conferences and in other ways be a real part of the school operation. For example, I serve as a room father several days a week. The purpose of Sacred Heart School, in my opinion, is to produce good citizens who are capable of leading useful and good lives. It is not primarily a school to enforce the Catholic faith upon children. I do not believe this can be done, in any event, and I know that the administrators and teachers at Sacred Heart School oppose any such approach to instruction in our religious faith.

16. If these public school shared time classes are denied children attending Sacred Heart School, my children will suffer serious educational setbacks. No such remedial and supplemental instruction had previously been provided at Sacred Heart School before the public school provided shared time classes. I believe those classes would not be replaced by Sacred Heart School if this lawsuit results in their discontinuance by the public school.

[Jurat and signature omitted in printing]

**Excerpt from the Sworn Offer of Proof of  
Intervenor Parent Irma Garcia-Aguilar**

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9. In my opinion, based upon discussions I have had with parents who choose to send their children to St. Andrews, the reason they have selected St. Andrews for their children's

schooling is very much the same reason my husband and I hold. They believe their children will get a better education. They want their children educated in a disciplined environment. They want their children to perceive what is good and bad and to have a value orientation which prepares them for life. They believe, many of them, that unless their children can attend St. Andrews that the future of their children will be greatly limited. I do not believe that this observation can be seriously disputed because of each of those families, particularly those not of the Catholic faith, must pay a very considerable amount of money in tuition to send their children to that school. Most of those same people are not well-to-do and the cost of tuition is a great sacrifice.

10. I believe that one of the most important benefits my children have realized by attending St. Andrews is their training and experience with respect to people of other races and religions. My husband and I could have selected another school where people of other races and religions were not so present but we believe that part of the teaching of the religion, as presented at St. Andrews concerning our obligations towards all others regardless of race or religion, is most effectively accomplished in that school.

11. I know that my life experience has been seriously hampered by my lack of education and by my limited cultural experience. I am determined that I do everything I can to see that my children are less hampered by these factors than I was. I believe there are very great benefits that my children receive in attending the shared time classes provided by the public schools. The education in the shared time classes in Spanish and French in the grade school level clearly broaden my children's outlook and abilities. The special assistance provided in remedial subjects, such as the remedial speech therapy provided to Carlos, is obviously of great importance to each of my children's future. The opening of their minds



of the culture of music which they receive in the shared time music classes will assist them in fitting into a society in which I still remain somewhat an alien. Obviously, the providing of physical education is a health measure which assists my children in developing their bodies and their social behavior and thus prepares each of them for the future.

12. If the result of this lawsuit will be to deny my children attendance at shared time classes I do not see how, as a practical matter, my husband and I could provide the same sort of educational instruction by any private means. None of these classes of instruction were presented before at their Catholic schools. We would, therefore, be faced with a choice between losing those educational benefits or taking the children out of the non-public schools where we feel they have their best chance for the future. This, then, would be a great hardship for each of them. Since my husband and I pay taxes to support the public schools, I do not see the justice of denying my children access to public school classes simply because they otherwise attend a non-public school.

[Jurat and signature omitted in printing]

**Excerpt from the Sworn Offer of Proof of  
Intervenor Parent Simon A. Aguilar:**

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14. Great changes have occurred in the Catholic schools since I attended them as a boy. This is particularly true at St. Andrews. When I went to Catholic schools we were required to go to church every morning. Most of our teachers were nuns. As I recall it, every subject, somehow or other, was made to apply to the Catholic religion. Now our children are taught English or mathematics and religion is not

interwoven. Religion may be the background but it is not an essential part of non-religious classes.

15. Now there is no requirement that parents or students attending St. Andrews or Catholic Central High School be of the Catholic faith. Children are not required to take religion courses at St. Andrews if their parents request that they be excused. The teaching of religion there is much more open than when I attended there 30 years ago. Our children are taught at St. Andrews to see the good in other religions. There is a voluntary religious service held once a week at St. Andrews. Children are not required to attend and no problem exists if a parent wishes them not to do so. To my knowledge, some parents have requested that their children not attend Mass and that has not presented any difficulties. In those classes that treat religious subjects, everyday issues concerning drugs, sex, peer pressures, world peace, racial relations and so on, are discussed from a religious point of view. The teaching of religion is not a predominant factor in St. Andrews nor in my opinion in Catholic Central. The purpose of these schools today, in my experience, is to prepare children to their highest academic and social skills and understanding for their future life. They are given the opportunity to learn the values of the Catholic faith but there is no attempt to impose these values upon them.

16. Over forty percent of the students attending St. Andrews are not Catholic. Approximately fifty percent of the students are of minority races, principally of the Black race. I don't know what percentage of the students would be Mexican-American. We selected St. Andrews for our children to attend, not only because I had attended there, but because of this mixture of races. I really believe in this and I think, in consequence of this school experience and our own convictions, my children are without racial prejudice. I could readily have sent my children to other schools which were

not of the mixture of races and religions as are presented at St. Andrews but determined that this was the necessary choice.

17. I don't know what the religious faith of each of the teachers are at St. Andrews and Catholic Central High School, but I know, particularly at St. Andrews, that other religious faiths are treated with respect and understanding, particularly because of the make-up of the student body. No priority is given to admission of students based on their religious faith, at least at St. Andrews. Enrollment is open to all who wish to attend.

18. In my youth, St. Andrews and Catholic Central High School were totally operated by the clergy of the Catholic Church. That is not true today. I was elected to and have served on the Board of Education of St. Andrews within the past few years and my wife is presently a member of that Board. This is a very great change from the past. The Board is made up of parents and other interested person who support the school. Board members are nominated by a petition signed by members of the parish. An election by the parish selects Board members. There is not a test or qualification as to Board membership.

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20. These Boards of Education, to my personal knowledge do really run the schools. In St. Andrews, the principal is a nun but her responsibility and authority is subject to the supervision of the Board of Education to whom she must answer. This is a very great difference from the time when I was a young person attending Catholic schools when the schools were operated under the control of the pastor. In consequence of this arrangement, parents of school children attending Catholic schools today in Grand Rapids have direct input into the operation of those schools. This was one of

the principal reasons we transferred our children to the Catholic schools.

21. To my knowledge, no person or child has been denied attendance at St. Andrews or Catholic Central on the basis of their religious beliefs or practices, or lack of them.

[Jurat and signature omitted in printing]

Excerpt from the Sworn Offer of Proof of  
William Gritter, Superintendent of the  
Grand Rapids Christian School Association:

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#### DEMOCRATIC ORGANIZATION— NOT CHURCH OPERATED

5. The Grand Rapids Christian School Association schools are not church operated or parochial schools but are private schools operated by an Association composed of parents and other persons who are supportive of Christian education. This Association elects a board of twelve trustees to operate the schools and make basic policy decisions. Each trustee serves for three years and every year four new trustees are elected. Each of the six schools also elects a board that carries out responsibilities delegated to it by the Association Board of Trustees. Thus the Association is very democratically structured with all board members chosen in elections that are held in the spring of each year.

6. It must be said that the membership of the Christian Reformed Church has historically been very supportive of the Grand Rapids Christian schools including financial support. Approximately 82 percent of the students come from that church, but in recent years the number of students from non-



Christian Reformed families has been increasing. However it must be emphasized that the schools are not operated or controlled by the Christian Reformed Church but rather by a board of trustees elected by the membership of the Grand Rapids Christian School Association. In other words these schools are not "an integral part of the religious mission of the church" since they are not operated by a particular church. It should be understood that these schools are not operated by a church for a very fundamental reason. These schools were started and continue to be supported by families who are part of the Reformed, Calvinistic tradition. And that tradition believes very strongly that it is the responsibility of the parents to educate their children — not the responsibility of the church or state. For this reason the parents started their own schools without affiliation or connection with the Christian Reformed Church itself. Although they respect the right of any family to request the state or church to operate schools for their children, members of Reformed, Calvinistic tradition oppose for themselves and their children schools operated by the state or church.

### CHRISTIAN SCHOOL PURPOSE

7. The basic purpose of all schools is to prepare students to be responsible and productive citizens. The Grand Rapids Christian School Association schools differ in that in addition to the secular subject matters, classes in religious education are a part of the instructional program. This religious instruction is not the teaching of the doctrine or tenets of a particular church but rather a study of the Bible and a consideration of how the teachings of the Bible apply to the life of the students. Also in the secular subject matter the teacher addresses religious and moral questions that arise when they are relevant to the subject matter being taught but this is never done in a manner which would distort or

intrude in the secular subject matter with irrelevant religious issues. Furthermore, no student is required to adhere to or accept a particular doctrine or dogma of any church.

It must be emphasized that we believe that our schools exist in the best tradition of schools. We believe that our Christian schools must not be a fringe movement in society: negative, sectarian or divisive. The school must be the *school*; that is, having its own unique task to perform. That task is essentially to provide education to its students which will be formal, liberal, total and humane. That is its dominant purpose and not "the inculcation of religious values" nor "the teaching, propagation and promotion of a particular religious faith".

### TEACHER COMPETENCE AND RELIGION

8. Teachers in the Grand Rapids Christian School Association are not required to be members of a particular church. In fact, teachers on our staff are members of various churches and religious faiths. We require that teachers must be highly competent in their area of teaching both from the point of view of pedagogical method and preparation and knowledge of the discipline or subject area to be taught. Approximately 70% of the teachers have Master Degrees and they are expected to give evidence of continued professional improvement so that teaching excellence can be maintained.

### CURRICULUM

9. The curriculum of the Grand Rapids Christian schools provide the same basic course of study found in the public school district. All subject content mandated by the legislature is included in the prescribed curriculum at both the ele-



mentary and secondary levels. We provide this curriculum because we believe that it is necessary if the student is to be prepared to live a responsible and productive life and not to teach or promote a religious faith.

#### **OPEN STUDENT ADMISSION— RELIGIOUS EDUCATION AND EXERCISE**

10. The admission policy of the schools does not restrict enrollment to students of a particular faith. We do require that students attend classes in religious education as well as any religious exercises that the school may hold, such as a chapel exercise. Parents of students are informed at the time of admission of this requirement. This is considered necessary if the school is to maintain its integrity and purpose for existing. However, no student is indoctrinated in the doctrine or dogma of a particular church and attendance at our schools is open to all.

11. The students enrolled in the Grand Rapids Christian schools represent families from a wide range of churches and income levels. Families affiliated with over one hundred different churches send children to Grand Rapids Christian schools, including Reformed, Baptist, Pentecostal, Congregational and Episcopal Churches. Also the Grand Rapids Christian School Association has a policy stating that it will not refuse a student because of the inability of a family to pay full cost. This is possible because of the financial support provided by various groups. One such group is known as E.C.C.E.S. (Evangelical Committee for Christian Education Scholarships) which raises funds to make available scholarships to low income families. At the present time 40 of the 42 students supported by E.C.C.E.S. represent minority families who otherwise would not have the option of an alternative to public education.

12. One of the five elementary Christian schools (Oakdale) is located in the inner city of Grand Rapids and its enrollment reflects a 25% minority enrollment. Recently the Association approved a proposal to spend 1.6 million dollars to renovate and expand that facility. The present building will be upgraded and a new gymnasium will be added. This decision was very significant because it expressed the Association's commitment to serve the families living in that inner city area. In the April 22, 1981 edition of the *Grand Rapids Press*, the Editor paid tribute to the decision made by the Association. He wrote: "At Oakdale Christian, the enrollment is far from sagging, but most of the 18 classrooms are 30 to 60 years old. From the public standpoint the significance of the Oakdale plan is the Christian Schools Association commitment to the inner city. The association might have closed Oakdale Christian, its only inner city school, and bused the 405 students, including more than 100 minority pupils, elsewhere. The refusal to seriously consider that alternative is to the advantage of the area and to the credit of the Association".

#### **PUBLIC SCHOOL SHARED TIME CLASSES**

13. The shared time classes provided by the Grand Rapids public schools to students otherwise attending our Christian schools are provided by public school teachers in classrooms leased from the Christian schools and located in the Christian school buildings. Those classrooms contain no religious symbols or statutes. The classrooms are marked by a sign at their entrance indicating that they are public school classrooms. The teachers teaching these shared time classes are regular employees of the public schools and are subject to the supervision of the public school administrators. The materials employed in the shared time classes are provided by the public schools and, to the best of my knowledge, are the same mate-

rials and textbooks employed by the public school in its other public school classes conducted in public school buildings. Such material and textbooks are free of any religious reference. No monies of any amount are paid by the public schools to the Christian schools or any of Christian school employees as a part of providing these shared time classes to students attending the Christian schools. Contact between the supervisors of the shared time public school teachers and Christian school administrators is only casual and infrequent when they visit the school for supervision of the public school teacher. The public school administrators never intrude upon the Christian school themselves. No inspection or supervision of the Christian school or its instructional program is ever subject to examination by the public school administrators, whose sole function is the supervision of the public school teacher and the shared time leased classroom where she teaches.

14. The public school shared time program is very important to the students served by our Association schools. Such programs as remedial reading, remedial mathematics, outdoor education and advanced courses at the high school were never offered by our schools because of the cost. The Christian schools would not close if these programs were dropped but I do believe that serious harm would result in thereby failing to meet the educational needs of all the students. If the Court terminates such remedial and enrichment courses they would very probably not be replaced by the Christian schools because of the prohibitive cost.

[Jurat and signature omitted in printing]

**Excerpt from the Sworn Offer of Proof of Intervenor Parents Bruce and Linda Bylsma**

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5. • • •

We have had Jeff diagnosed by a psychologist and after his examination he advised us that Jeff had hand-eye coordination difficulties and other perceptual problems which were causing all of the reading and other learning problems that he was experiencing. For example, Jeff would on occasion, write letters backwards. Mrs. Jasper has had him do such things as walk a balance beam. She works a lot on sequential exercises and teaching him to follow directions both verbally and written. It is clear to us that had Jeff not received his remedial assistance he would not have been able to advance to the third grade. Furthermore, and much more important, it is apparent that the benefit that Jeff has received from this class has resulted in his believing in himself and having confidence in his own self worth.

6. We are well acquainted with Jeff's teacher, Mrs. Jasper, whom we regard as a very dedicated human being. We see her at least at the end of every term and periodically we receive written reports from her during the course of the term. Such reports go into great detail showing the progress of our child. She is very sensitive and especially skilled in treating children who have reading handicaps.

7. Eric is our youngest son and is in the kindergarten. It appears that he is in need of basic pre-reading assistance. Particularly in the area of listening skills and visual and auditory deficiencies. It would appear that Eric will probably need extra support in reading for several years. Thus we can anticipate that Eric will have the perceptual problems that Jeff has already experienced.



8. There is no religious test or requirement regarding attendance at Millbrook Christian School. There is some form of agreement that exists between the parent and the school through which the parent acknowledges the orientation of the school as to its Christian commitment and accepts that orientation. We know that no child or family is denied attendance at Millbrook Christian School because of race, religion or financial need. For example, I am acquainted with a Seventh Day Adventist family whose children attend Millbrook School. No responsibility is placed on that family to alter their religious faith or to comply with any conditions in having their children attend Millbrook Christian except to accept the orientation of the school.

• • •

10. No religious symbols exist in the shared time classrooms at Millbrook Christian School. One could not detect any difference between that classroom and a public school classroom located in any public school. From my own personal experience I, Linda Bylsma, can state that the textbooks and materials that are used in the public school shared time classes in which my children participate are free of religious content. In fact, many of them are the same materials that our psychologist used when he tested and treated our son Jeff. They are recognized professional materials for such evaluations and treatments.

11. Millbrook Christian School is operated by a Board of Education. Members of that Board are elected by an annual meeting of parents and other members of the Christian School Society of the Millbrook Christian School. This Board of Education truly operates the school. There is no connection between the school and any church, even with the Christian Reformed Church which we personally attend. The Board is responsible to its constituency, primarily parents, and must

try to operate in a way they believe the parents would desire. There is no requirement that members of the Board of Education be members of the Christian Reformed faith.

12. If this lawsuit results in the denial of remedial reading assistance to students such as our son, Jeff, the result will certainly be to set such children back in the educational attainment. It is apparent to us that our son, Eric, will need the same sort of assistance from some other source. No such remedial reading instruction was available in Millbrook Christian School before the shared time classes were provided by the public schools. We believe it would be unjust and violative of our rights and the rights of others to deny our children such public assistance because of our religion. In fact, the remedial reading instruction is essentially a health and therapy program. As a result of it, for example, our son Jeff can now catch a ball when he could not do so before. But, more important, he is now able to receive an education. To deny that kind of assistance would be denying our children what they should have as citizens of a free country.

**Excerpt from the Sworn Offer of Proof of  
Intervenor Parent Shirley Leestma:**

• • •

9. Remedial reading instruction was not provided at Millbrook Christian School before shared time instruction was provided by the Grand Rapids Public Schools. If Amy were to be denied the remedial reading assistance which is presently provided to her through the public school shared time classes because of her religious belief or her attendance at Millbrook Christian School, I believe that such an action would be clearly discriminatory. It would greatly deprive Amy of the special assistance she must have. My husband and I are taxpayers and citizens of this community and of



this country. We do not believe our child, who is subject to a handicap, should be denied remedial assistance because of her or our religious beliefs or practices.

[Jurat and signature omitted in printing]

**Excerpt from the Sworn Offer of Proof of  
Ronald J. Cook, Superintendent of Grand  
Rapids Catholic Schools:**

. . .

2. Of the 354 elementary school lay teachers employed in the Catholic schools in Grand Rapids, 232, or sixty-six (66%) per cent received their Bachelor degree from a public or state college.

3. Of those same 354 elementary lay teachers, 301 or eighty-five (85%) per cent received their practice training in a public school.

4. Grand Rapids Catholic Central and Grand Rapids West Catholic High Schools are both accredited by the University of Michigan, Bureau of School Services, School of Education. To gain and maintain such accreditation, Catholic Central and West Catholic High Schools must and do meet the standards of accreditation established by the University of Michigan.

5. The following statement was adopted and issued by the Board of Directors of the Michigan Catholic Conference on June 16, 1967. It is applicable to the Catholic Schools of Grand Rapids:

"No child, regardless of religious affiliation, whose parents desire to enroll him in any Catholic school in Michigan which possesses capacity for additional enrollees shall be denied admission to that school on the basis of race, color or national origin."

6. Implementing such statement of policy, the Grand Rapids Diocesan Board of Education adopted the following statement of principle:

"When space permits, schools, elementary and secondary, are encouraged to enroll students to achieve cultural and ecumenical balance while maintaining the Catholic Character of the school."

7. The following statements of policy regarding the curriculum of the Grand Rapids Catholic Schools has been adopted by the Grand Rapids Diocesan Board of Education:

"The school curriculum encompasses all the learning experiences—cognitive, psychomotor, affective—that are planned and directed by the school.

The curriculum develops the student's responsibility to God, self, home, church, community, country, world and other persons.

The curriculum shall be broad in scope and shall provide for a wide range in rates and readiness and potential for learning."

8. School children attending the Catholic elementary schools listed on attached Schedule "A" are provided shared time instruction by public school teachers in art, remedial and enrichment mathematics, music, physical education and remedial and enrichment reading during regular school hours. Prior to the provision of this shared time instruction no similar classes of instruction had been provided such students by the Catholic schools they attend. Regular courses in reading and mathematics continue to be provided students attending such Catholic schools by the Catholic school apart and aside from the shared time remedial and enrichment classes. What the shared time program provides that was not present before is the presence of a teacher who is a specialist in these subject

matter areas. The specialist provides more expertise in specific lesson planning, teaching techniques, and the use of a wider range of instructional tools and materials. Prior to the shared time program the regular classroom teacher, who we may describe as a generalist, provided the whole range of classroom instruction. The shared time specialist is used to supplement the regular level of instruction provided by the classroom teacher. By employing this auxiliary educational technique students in need of particular and expert assistance or students having abilities not reached by their ordinary classroom instruction are given the attention and skilled instruction focused on their needs and abilities.

9. The same facts are true with respect to the provision of instruction in these schools in the subjects of art, music and physical education. Classes were provided in some of these schools prior to shared time in these general subject areas, but they were provided irregularly, were taught by a generalist or a volunteer parent without a planned curriculum and the expertise and specialists in these respective fields provided the school children presently through the public school shared time classes were simply not there. In almost all cases, for example, in the field of physical education, the classes consisted of a period of relatively unsupervised recreation. Participation by the school children in the former sporadic effort to provide through relatively unspecialized or volunteer personnel some minimal experience in the named fields (where any experience was, in fact, provided at all) must be contrasted with the present shared time classes which provide a professional organized undertaking by a trained specialist in the area following a developed curriculum designed to move the school child towards an established goal. Shared time courses provided after school in the Catholic elementary schools were not previously provided to students there by those schools.

[Jurat and signature omitted in printing]

**Excerpt from the Sworn Offer of Proof of  
William Gritter, Superintendent of the  
Grand Rapids Christian School Association**

• • •

2. Grand Rapids Christian High School is accredited by the North Central Association of Colleges and Schools as well as by the University of Michigan, Bureau of School Services, School of Education. To gain and maintain such accreditation, Grand Rapids Christian High School must and does meet the standards of accreditation established by those accrediting organizations.

3. Shared time classes are provided by public school teachers in leased classrooms at the following elementary schools in remedial and enrichment reading, remedial and enrichment mathematics, outdoor education and physical education:

Creston Christian

Seymour Christian

Millbrook Christian

Sylvan Christian

Oakdale Christian

Prior to the provision of those classes by public school shared time instruction, no similar classes or instruction had been provided in those schools. With respect to physical education, the above schools had had classes prior to shared time but those classes were dissimilar in content and curriculum from that provided by the public school classes. Public school shared time classes provide a broader program and more complete experience for all the students, including such additions to the subject matter as racketball at Millbrook Christian under the expanded program of shared time physical education courses.

[Jurat and signature omitted in printing]

Excerpt from the Sworn Offer of Proof of  
Kraig C. Johnson, Principal of Immanuel-  
St. James Lutheran School:

• • •

#### SHARED TIME CLASSES

4. The shared time classes are provided through the Grand Rapids Public School at public school facilities and in leased classrooms controlled by the public school in nonpublic sites. Immanuel-St. James students participate in outdoor education (K-8), physical education (K-8), art (K-8), music (5-8), and Spanish (5-8).

• • •

6. The teachers teaching the shared time classes are regular employees of the public schools and are subject to the supervision of the public school administrators. The materials employed in the shared time classes are provided by the public school. Such material and textbooks are free of any religious reference. Contact between the supervisors of the shared time program and this nonpublic school administrator is infrequent and casual. The public school administrators never intrude upon the nonpublic school and its educational program or instruction. I exercise no control over public school shared time teachers.

7. Shared time classes did not arise out of any crisis or institutional need of Immanuel-St. James Lutheran School. Rather, shared time classes were begun by the public school board of education as a means of providing students, who were children of resident taxpayers in the community, with enrichment or supplemental educational offerings which they would otherwise not have had available to them.

8. The shared time classes provided by the public schools are enrichment or supplement classes. None of the shared time classes are part of the core curriculum of Immanuel-St. James School. They are not part of the essential curriculum to be taken by the students at Immanuel-St. James to be promoted from level to level or to graduate from the eighth grade from our schools.

9. Prior to the availability of outdoor education and Spanish through the shared time program, Immanuel-St. James School did not provide these enrichment activities for the students due to lack of financial resources and/or teacher expertise. Prior to the shared time program, art, music and physical education were provided by the Immanuel-St. James classroom teachers to the best of their ability. These same classroom teachers still provide some art, music and physical activities within the educational program. However, time spent in these educational activities is now limited.

10. Immanuel-St. James School has existed as a school since 1971. The school will not cease to exist whatever the outcome of this situation. However, the shared time classes provided by the Grand Rapids Public School at public and nonpublic sites (Immanuel or St. James) have proved to be of great benefit to the student. With the shared time classes, the students have had enrichment and supplemental opportunity being offered that they would not have been exposed to otherwise.

#### ORGANIZATION AND GOVERNMENT OF IMMANUEL—ST. JAMES SCHOOL

11. Immanuel-St. James is a reality because of the joint efforts of the lay members of Immanuel and St. James Lutheran congregations in Grand Rapids. The school was estab-



lished and maintained through the authority of the Voters' Assembly of each congregation. The Voters' Assembly is made up of the lay people holding church membership in the two congregations. The Voters' Assemblies authorized and established a joint board of education as their administrative agent, to direct and conduct the affairs of the school as defined in the constitution and bylaws. The joint school board of education consists of three elected lay members from each participating congregation. The lay members of the joint school board are nominated from the congregational membership of each respective congregation and are elected to their position by the Voters' Assembly of each congregation. The joint school board members have the responsibility of operating the school and properly representing the interests of the school to their respective congregations. The day-to-day operation of the school is subject to the policies established by the action of the joint school board. Thus, the principal reports and is responsible to the joint school board concerning school matters.

12. Immanuel-St. James Lutheran School admits student of any race, color, national and ethnic origin to all the rights, privileges, programs and activities generally accorded or made available to the students at the school. Immanuel-St. James does not discriminate on the basis of race, color, national or ethnic origin in the administration of its educational policies, admissions policies, and other school administered programs. Children of other religious preference are openly accepted unless attendance would cause conflicts for the student due to the religious philosophy of the Lutheran school.

13. Members of the sponsoring congregations are given first opportunity to enroll their children. Children of non-member families are accepted on the following basis and availability of space:

1. Children from sister congregations of the Lutheran Church, Missouri Synod;
2. Children from other Lutheran churches;
3. Children from other Christian churches;
4. And others who desire a Christian education.

As a practical matter it has never been necessary to apply this standard of attendance preference. In fact, availability of space within the school has not presented a problem for a number of years. The school has had openings in all its levels or grades. Remaining space in the school has been and is accordingly open to all without regard to the religious affiliation or racial background of the student or his parents.

#### **PURPOSE AND THE PLACE OF RELIGION IN IMMANUEL—ST. JAMES SCHOOL**

14. The primary purpose of Immanuel-St. James Lutheran School is to educate its students in the secular subjects in accordance with the requirements of the State Board of Education, under the laws of the State of Michigan. In addition, we willingly subscribe to the Common Goals of Michigan Education. The secondary purpose of Immanuel-St. James is to provide a Christian community for its students in which they may learn and develop intellectually, emotionally, socially, physically and spiritually. The teaching of the Bible is part of the curriculum as perceived by the Lutheran faith so that, for those who freely accept these teachings, life may have an additional meaning.

15. Immanuel-St. James Lutheran School includes prayer and religious instruction during the normal school day. In addition to the daily formal study of the faith and daily

devotions, the students and staff assemble once a week or on days of special religious significance for a devotional service. Religious services are not conducted on a daily basis. Students in the school are expected to be present during religious instruction and services. The degree to which any individual student (Lutheran or non-Lutheran) participates in these classes or services is a matter of his or her own free choice based on his or her own conscience.

16. Confirmation classes, which have traditionally been part of the 7th and 8th grade curriculum, are held one morning out of the week for those who anticipate membership in our two supporting congregations. Non-member children are expected to attend these classes to achieve a greater understanding of the Bible as understood by the Lutheran faith. No child, whether Lutheran or otherwise, is coerced or forced to accept or believe the Lutheran faith. They are, however, encouraged to search the Bible and their being to better understanding the nature of their personal values. The inculcation of religious truths would be repugnant to our religious faith. Belief in God is a gift of God and cannot be inculcated.

### RELIGIOUS AND SECULAR EDUCATION

17. Parents who enroll their children at Immanuel-St. James are advised in advance of the religious aspects of the school program. They are aware that daily religious instruction and periodic religious services are included within the curriculum and the educational program of the school. Parents of the Lutheran faith have always wanted their children to attend and participate in such religious instruction and services. Likewise, parents of other faiths give their approval for their children to attend and participate in the religious instruction and services as school experience demonstrates.

18. It has been the policy of Immanuel-St. James School Board that all families who belong to either of the two supporting congregations and have children attending Immanuel-St. James School should be in and maintain active fellowship with their own Christian Church. The emphasis in this statement is on *should* be, not *must* be. It is our position that the home, school and church can be of great assistance to each other in the development of the child into a total person.

19. Teachers are selected for their expertise in a particular academic area and/or level. They are usually graduates from one of our synodical colleges and are of the Lutheran faith. But this is not an absolute. For example, one of the five teachers presently employed by the school received her teacher training at a state college in Michigan. The joint school board does require teachers to be members of the supporting congregations.

20. Immanuel-St. James Lutheran School does not exist as some form of a recruiting station for the Lutheran Church. The school exists to provide each of its students with the best possible education, an education that is totally integrated with secular subject matter, social understanding and religious orientation.

21. Shared time teachers are selected by the public school system. Immanuel-St. James School does not have any opportunity or input to help in the selection of public school shared time teachers who provide services in the school. In fact, we know very little about the shared time teachers.

22. The other subject areas in the curriculum (other than religion) are provided at Immanuel-St. James School and taught in a manner as to educate the student in the particular subject. No secular subject is taught in such way as to indoc-

trinate the student in a particular religious belief. However, teachers do address religious and moral questions that arise when they are relevant to the subject matter being taught but this is never done in a manner which would distort or intrude in the secular subject matter with irrelevant religious issues.

[Jurat and signature omitted in printing]

**Excerpts from the Sworn Offer of Proof of  
Robert Hornberger of the Michigan  
Department of Education**

The undersigned, Robert Hornberger, if called upon to testify in the above entitled cause, would testify under oath to the following facts:

1. I have been the Director of the Department Services Division of the Michigan Department of Education for the past fourteen years. In that capacity, I supervise the distribution of state school aid to school districts pursuant to the statutory allocation formulas enacted by the Michigan legislature. I have acquired the facts contained herein during the course of my employment in such capacity.

2. In 1976 PA 451, § 1282; MCLA 380.1282; MSA 15.41282 the legislature has provided:

"The board of a school district shall establish and carry on the grades, schools, and departments it deems necessary or desirable for the maintenance and improvement of the schools, determine the courses of study to be pursued, and cause the pupils attending school in the district to be taught in the schools or departments the board deems expedient."

Local boards of education have discretionary statutory authority to provide shared time instruction to part-time public school students pursuant to 1976 PA 451, § 1282, *supra*, and *Traverse City School District v Attorney General*, 384 Mich 390, 411, n 3 (1971). At the time of the Michigan Supreme Court decision in *Traverse City School District v Attorney General*, *supra*, in 1971, sustaining such practice, some Michigan school districts were providing shared time classes on premises leased from nonpublic schools. In *Citizens to Advance Public Education v State Superintendent of Public Instruction*, 65 Mich App 168; 237 NW2d 232 (1975), *lv app den*, 397 Mich 854 (1976), it was held that the provision of shared time instruction on premises leased from nonpublic schools by the Center Line, Bay City, and Warren Consolidated school districts was in conformity with the Michigan and United States Constitutions. In 1976 PA 451, § 331(1), MCLA 380.331; MSA 15.4331, the legislature has provided:

"The school district shall be a body corporate, governed by a board of education; may sue and be sued; and may take, hold, lease, sell, and convey real and personal property, including property outside its corporate limits, and property received by gift, devise, or bequest, as the interest of the school district may require. Land outside the school district shall not be acquired unless approved by a 2/3 vote of members elected to and serving on the board."

Pursuant to 1976 PA 451, § 331, *supra*, a second class school district such as the defendant school district herein has the authority to lease real and personal property, including property located outside its corporate limits. Based on its administration of sections 1282 and 331(1) of 1976 PA 451, *supra*, the Department of Education makes state school aid payments to the defendant school district for part-time public school pupils receiving shared time instruction on leased premises located outside the school district.



3. In 1979 PA 94; MCLA 388.1601 *et seq*; MSA 15.1919 (901) *et seq*, § 6(1) and (2), copy attached as Appendix A, the Michigan legislature has recognized part-time membership or attendance in the public schools as a basis for distributing state school aid funds to school districts and expressly provided that school districts may count nonresident, nonpublic part-time pupils in membership without the approval of the school districts of residence of such pupils.

4. The administrative rules promulgated by the State Board of Education pursuant to 1979 PA 94, *supra*, define part-time public school pupils and set forth the rules for computing part-time membership in the public schools for purposes of distributing state school aid to school districts for pupils in part-time public school attendance. (See, respectively, R 340.6 and R 340.7, Administrative Code 1979, Vol II, pp 2732-2733, which are attached hereto as Appendix B and Appendix C). In R 340.6, *supra*, one of the six categories of part-time public school pupils that may be counted in part-time membership for purposes of state school aid payments to school districts is nonpublic school pupils who are also enrolled in and attending the public schools on a part-time basis.

. . .

6. In 1979 PA 94, *supra*, § 111(3), a copy of which is attached hereto as Appendix E, the Michigan legislature has appropriated an additional allowance for nonpublic, nonresident pupils in part-time public school membership in recognition of the lack of uniformity between public school district boundaries and the attendance boundaries of nonpublic schools. In light of the additional allowance appropriated in § 111(3), school districts are neither required nor authorized to charge tuition for nonpublic, nonresident pupils in part-time membership.

7. Since the decision of the Michigan Supreme Court in *Traverse City School District v Attorney General*, *supra*, some Michigan school districts have contacted personnel in the Michigan Department of Education concerning the possibility of holding shared time classes on premises leased from nonpublic schools. When consulted, Michigan Department of Education personnel have told local school officials that they may provide shared time classes on premises leased from nonpublic schools under conditions of public school control, as a public school open to all eligible to attend the public school, in conformity with the decision of the Michigan Supreme Court in *Traverse City School District v Attorney General*, *supra*. Subsequent to the decision in *Americans United for Separation of Church and State v Porter*, 485 F Supp 432 (WD Mich, 1980), school districts inquiring about shared time on leased premises have also been made aware of such decision.

8. I have not observed any political controversy in terms of attempts to change the statutes and administrative rules that provide school districts with the discretionary authority to provide shared time instruction on premises leased from nonpublic schools and receive state school aid payments for part-time public school students who are also enrolled in nonpublic schools.

[Jurat and signature omitted in printing]

## APPENDIX A

[PUBLIC ACT NO. 134]

§ 15.1919(906) Membership.] Sec. 6. (1) "Membership", except as otherwise provided in sections 56 and 62, means the number of full-time equivalent pupils in grades K to 12 actually enrolled and in regular daily attendance on the pupil membership count day as determined by the number of pupils registered for attendance plus pupils received by transfer and minus pupils lost as defined by rules promulgated by the state board. In a district operating an extended school year program approved by the state board, a pupil enrolled, but not scheduled to be in regular daily attendance on the pupil membership count day, shall be counted. The department shall give a uniform interpretation of full-time and part-time memberships. The state board may provide a district with an adjustment of the district's membership count upon the showing of a substantial increase in membership due to the closing of a nonpublic school after the pupil membership count day.

Pupil; district of residence, approval by district.] (2) "Pupil" means a person in membership in a public school. A district must have the approval of the pupil's district of residence to count the pupil in membership, except approval by the pupil's district of residence shall not be required for adult [or nonpublic] part-time pupils or for those pupils who were enrolled and in regular daily attendance and remain enrolled and in regular daily attendance in the district other than their district of residence before April 1, 1981.

## APPENDIX B

R 340.6 Part-time pupils.

Rule 6. A resident or nonresident pupil enrolled in a school district on the count dates, attending classes which comprise less than a full course of instruction for a full-time pupil and earning credit toward a high school diploma, may be counted in part-time membership. The following pupils are included:

(a) A postgraduate pupil who has received a high school diploma and who returns to high school to take additional work for credit.

(b) A nonpublic school pupil enrolled in a nonpublic school and also enrolled in and attending the public school on a part-time basis.

(c) A pupil enrolled in the school district and attending regular day or evening school classes.

(d) A pupil enrolled in the school district in apprentice or on-the-job training programs approved by the state board of education. A minimum of 4 clock hours of supervised instruction per week shall be provided each apprentice or on-the-job training pupil.

(e) A pupil enrolled in a practical nursing program approved by the board of nursing and the state board of education.

(f) A pupil enrolled in the school district and attending adult basic education or adult school programs leading to graduation from high school.

## APPENDIX C

### R 340.7 Computation of part-time membership.

Rule 7. (1) A part-time pupil in membership on the count dates is counted in membership in the amount computed on the pro rata basis provided in the following subrules. An adult part-time pupil, 18 years of age or older as of September 1 of the school year, is not required to receive instruction on each of the minimum 180 days of school. A part-time pupil in membership shall not be counted as more than a full-time pupil in membership.

(2) The prorated membership for a pupil taking instruction in grades 1-12 is computed by applying a ratio which is the relation between the number of clock hours per week spent in classes for which credit may be earned in a public school and 25 clock hours per week.

(3) The prorated membership for a pupil, regardless of age, attending grades 1-8 and taking instruction in adult basic education programs which provide instruction in primary level mathematics, communications, and related skills is computed by applying a ratio which is the relation between the number of clock hours per week spent in class for which credit may be earned in a public school and 25 clock hours per week.

(4) The prorated membership for a part-time pupil, 18 years of age or older on September 1 of the school year, taking instruction in adult high school completion programs in grades 9-12 is computed by applying a ratio which is the relation between the number of clock hours of student instruction received and 480 clock hours of instruction for the school year.

(5) The prorated membership for a post graduate pupil taking academic or vocational-technical courses that would nor-

mally be credited toward high school completion is computed by applying a ratio which is the relation between the number of clock hours of student instruction received and 480 clock hours of instruction for the school year.

(6) The prorated membership for a pupil in an apprentice or on-the-job training program is computed by allowing  $\frac{2}{5}$  membership for each pupil enrolled in such program.

(7) The prorated membership for a pupil in a practical nursing program is computed by allowing  $\frac{1}{2}$  membership for each pupil enrolled in such program.

(8) A pupil enrolled in and attending classes in more than 1 school district shall be counted as a part-time member by each school district, but the total of the part-time memberships shall count for not to exceed 1 full membership.



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

AMERICANS UNITED FOR  
SEPARATION OF CHURCH  
AND STATE, et al,

Plaintiffs,

v

THE SCHOOL DISTRICT  
OF THE CITY OF  
GRAND RAPIDS, et al,

Defendants.

No. G 80-517

MONDAY, MAY 17, 1982  
(Vol. VB)

Excerpt from the trial testimony of  
DR. ELMER VRUGGINK, having been duly sworn

. . .

(Direct Examination by Mr. Dilley)

[Vol. VB 921] Q All right. Now, does the lease cover only the shared time program you offer or does it cover also the community ed program that you may have in the same school?

A Covers all the programs we have.

Q Both shared time?

A Yes.

Q And community education?

A Yes.

Q So the lease is the instrument by which the Grand Rapids Public Schools have gained entrance to these particular buildings, is that right?

A Yes.

. . .

[Vol. VB, 944] Q And, what is your — why do you do this?

A Well, we do it, we do it first of all because we have a service to offer for — generally for people in the State of Michigan and we do it in a cost effective way such that it will generate revenue for us that will more than take care of the program.

Q So, you receive state school aid for those programs?

A Yes.

Q Including the program offered in the non-public school [945] buildings?

A Yes.

Q And, the amount you receive from the state in state aid more than covers the cost to you of extending those programs?

A Yes.

. . .

[Vol. VB, 945] Q For the programs that we have been talking about in shared time, do you receive altogether about three million dollars in state aid?

A The state portion?

Q Yes.

A It's approximate.

Q And, would that be for about 3,000 full-time equivalent students?

A Yes.

. . .

TUESDAY, MAY 18, 1982

(Vol. VI A)

Dr. Elmer Vrugink (continued)

[Vol. VI A, 985] Q And did you say that the courses in shared time that are taught in such a leased facility are also available in all of the buildings that are owned and operated by the Grand Rapids Public Schools, such as Mulick Park?

A All of the same courses?

Q Yes.

A Are you talking now about the — which part of the program?

Q Shared time.

A Shared time? During the day? [986]

Q Yes.

A Okay, yes. It would be pretty much if we offer physical education to get at a specific example, if the curriculum that we also offer with a public school teacher at all of the other sites.

Q So that the same class, we'll say, we'll call it remedial reading, just for these purposes, that same class is available at Mulick Park and at Immaculate Heart?

A There would be, yes, the types of programs we offer in the non-public shared time are the classes, the curriculum that we offer in the public schools, as well.

Q All right. And the same class, we'll call it, again remedial reading, is also available at Sylvan Christian, is that right?

A Yes. If it's accepted by the — when we make the offer, if it's accepted by them, then it's — remedial reading bothers me a little bit because it's an individualized diagnostic type program in terms of remediating difficulties and sometimes the techniques you use in it may be a little different. That's why I'm hesitating on that particular example.

Q Well, in any of the classes that we're talking about, whether it's remedial reading or math, remedial math, we'll call it or art —

A Yes.

Q — music — [987]

A Yes.

Q — they are conducted by teachers that go around from one school to the other, isn't that right?

A Yes. In those cases they would be the same program.

Q Exactly the same?

A Yes.

. . .

[Vol. VI A, 1032] THE COURT: As far as your shared time program during the regular school day, are there any programs offered in private schools that are not offered in public schools?

THE WITNESS: No.

\* \* \*

[Vol. VI A, 1054] THE COURT: As to these programs and inasmuch as you have the burden of proof, the point is being made that you have not sustained that burden of proof by establishing the prima facie case with respect to those three programs.

MR. DILLEY: That's true.

THE COURT: You agree to that?

MR. DILLEY: I do.

THE COURT: The Court grants the Motion of the Defendant school district with respect to the outdoor education program, the drown proofing program, the drivers' education program. Motion for a directed verdict with respect to those programs is granted.

\* \* \*

WEDNESDAY, MAY 19, 1982  
(Vol. VII A)

(Direct Examination by Mr. Farr)

[Vol. VII A, 1070] Q For the purposes of the record, would you just quickly read into the record the first three short paragraphs there, please, what the philosophy of the board is.

A "The Grand Rapids Board of Education is committed to providing for each student, an equal opportunity for a quality education. Education is an endeavor or process which seeks to develop an excellence of mind, spirit and attitude which man so uniquely is capable, and able to reach the ultimate goal, the happiness and fulfillment of each individual and welfare of society.

"The board recognizes that no two students are alike. They have differing needs, differing abilities, differing aspirations. The board seeks the fully developed individual maximizing his potential talents and interests.

"The board is concerned for the exceptional child, and will provide opportunities for both the talented and the handicapped."

\* \* \*

[Vol. VII A, 1097] Q \* \* \* What do you mean as the deputy superintendent for the Grand Rapids Public Schools by the term shared time?

A Shared time, \* \* \* I would characterize as an offering for youngsters in the non-public schools, a supplemental, secular education program. And, I think the word supplemental implies non-core type subjects.

Q When we use the term shared, what do we mean as between public and non-public?

A Well, it's shared in that we, the teachers, can be part of the public school teachers, obviously, and the time that a non-public school youngster is in school is shared between the public school and his regular core program in the non-public.



Q Can you tell the Court, please, why did the Grand Rapids Board of Education undertake what we now know as shared time?

A I think there is a variety of reasons, some we have spoken to. One is our philosophy of education, as we indicated earlier, which is to offer programs for this total [1098] community for all people who want an education and use our services, I would say that's one of the reasons.

I think secondly this is a unique community. It is a unique community in that we have a very large number of people who choose to send young people to non-public schools and I think that that basically is the philosophy.

. . .

[Vol. VII A, 1101] A Yes. I indicated in the definition of shared time, it is offered specialized classes, I might have added that in many cases we take a specialized teacher and in this case, we have people who are trained in those particular areas who go in there, they are art teachers and go in and teach a systematic curriculum of the Grand Rapids Public Schools and are told at the time when they started it, that they are public school teachers in leased facilities teaching a public school curriculum.

Q Is that also true with regard to the math, the music and physical ed as far as these people being specially trained over and above the usual background that a teacher has?

A Yes.

. . .

[Vol. VII A, 1112] Q (MR. FARR) Dr. Vrugink, you outlined earlier the community ed program, and we have heard more specific testimony from others in the record be-

fore on the after school program, et cetera. Taking the elementary level, K through 6, the after school community ed courses offered at non-public sites, is there a term that is used to describe the nature of those courses?

A It would be primarily we call them leisure time or enrichment classes.

Q All right. By and large, I realize that there may be exceptions in different schools, public schools as well as non-public schools, but by and large, are the same type of programs offered at public schools K through 6?

A Yes.

. . .

[Vol. VII A, 1113] Q How does that occur? I mean, we have already established there is no before school community education school at Ottawa High School or any after education community programs at Ottawa. How is it then you can say to the Court that same type of course is available to a student at a public high school such as Ottawa, Creston, or whatever?

A Well, in a couple ways. The main way being that our choice, our curriculum is much wider, much broader than a regular program. A youngster has a chance to take most of those programs from our regular course offerings, and as well, having a choice of taking it in the evening adult ed program.

Q Now, with regard to the elementary level, again, K through 6, the community ed courses offered, would you tell the Court generally speaking the duration, the length of those courses, and by that I mean when they start in the fall and when they end?

A They generally have a short duration. They could be eight weeks, some of them 12 week type courses. It depends

on the nature of the course. If it's a type of leisure class, it could even be as small as four weeks in some cases.

Q Now have the after school community ed program been offered at the public schools for a number of years?

A Yes. When we did community ed as far back in the '70s as I can remember.

. . .

[Vol. VII A, 1133] Q Now, at my request also on page two, this you prepared before the Court's ruling yesterday regarding drown proofing, et cetera, so at my request though before knowing the Court's ruling yesterday and using figure 3,000, why did you depict the number 3,000?

A 3,000 was approximately the number that is in the shared time program.

Q All right. Then, did you work through on page two the effect of losing, so to speak, those 3,000, how that would effect the income of the district?

. . .

[Vol. VII A, 1134] A Yes. If you take the two pages, you can see there are certain parts of it the same. Obviously, by lowering on the 3,000, you have a new membership of 33,410 levied the same, the state equalized value is the same. But, the amount behind each child, since that denominator now is smaller giving you a bigger number behind each FTE, which in dollars is now \$38,491.00 given that example. So, when you follow the formula down again, you get exactly the same items on one, two and three, still you get the \$1,927.00. But, the proportion of local share changes because you have got a higher number here so that the deduct really changes, and this item now goes up to 1,193 given the example and the other to 734.

Now, you multiply again the state aid, all members, and the deduct now you see to this issue lies right there in number seven. Notice that no matter how much your total is, the local deduct still remains the same since you have smaller kids, the amount local appears to be larger, but the state aid portion, given the formula, drops considerably, and the effect of it is that your total now is around 64,689,000 or approximately a little less than six million dollars less paid in. That's what is so confusing on the formula and the issue. That, the state aid, that the amount you lose comes out of [1135] item six primarily even though people get confused because they think the local share goes up, the local portion goes up, the deduct item, but the number effect of it is you get that same number by multiplying 1,927 times the 3,000 students lost. And, the net effect of it is you lose 3,000 kids, you lose \$1,927.00 for each one, and that is monies that come from the state.

Q Okay. The bottom line number is what?

A The bottom line number is when you multiply this approximately five million, whatever it comes out, subtract the 64,389 from 70,159.

Q All right.

A That will be approximately the same as 3,000 multiplied by 1,927.

Q Okay.

A Because of the cents, it won't be exact.

. . .

[Vol. VII A, 1139] Q Now, you have gone through the formula and advised the Court as to the amount of money generated from the state and also advised the Court that if 3,000 fewer students were included, what that would mean,

and we also have shown the Court here on Exhibit FF the amount of dollars allocated, budgeted, if you will, what we've been referring to as shared time programs, and obviously there is a difference between the amount shown on Exhibit FF and the amounts generated through the formula, am I correct?

A Yes, that's correct.

Q Now, speaking again to the Alexander situation or speaking generally, can you tell Judge Gibson, let's assume that those 3,000 students were lost for whatever reason, would there be then more services available to what we're characterizing as public school children, would there be the same or might there be less?

A I don't think there is any question there would be less given the conditions we have outlined here.

Q All right. Would you explain in however form you want to to the Court why that's so, because the inference is being made here that there would be more available for the public school children if this program was knocked out? On what basis do you say that there would be certainly no more or might be less available, say to [1140] schools like Alexander, if this program were stopped for whatever reason?

A Well, the explanation we went through shows that we would have reduced revenues, considerably reduced revenue as a result of losing 3,000 FTE's. That reduced revenue is like in several categories of programs. I indicated earlier in kindergarten, for example, if you separated it, brings in so many dollars per FTE. Elementary brings in so much. Secondary education, community ed, when you separate all of those, some of those have a revenue that exceeds actual cost and some have a revenue that is less than actual cost. Especially the special education is one that the revenue is far less than actual cost. So, it has to be picked up in other areas.

Remedial programs are the same way and some are programs where revenues exceed, kindergarten is one of those, and shared time is another one. Since you have revenues that exceed the actual cost, I recognize you have got indirect cost and a lot of charges to things that we don't have like myself and Dr. Dow and a lot of that you can rationalize. The facts are that you still have a program where the revenue more than takes care of the program, and therefore can be used in areas that are needy and it is on that basis I would say that if we lost additional revenue, we would have less services [1141] perhaps at schools like Alexander or other things had we not had it.

\* \* \*

[Vol. VII A, 1144] Q (MR. FARR) Dr. Vrugink, have you had certain, what I characterize as feedback from the community regarding shared time community education, whatever?

A Yes. We have occasionally through our public relations office do surveys of various kinds in the community. And, one I recall of doing a study years—or a couple of years ago dealt with the feeling about our shared time program, daytime shared time program. And, in that survey, I don't have it in front of me, I recall a high degree of acceptance of that program.

Q I show you what is in the tabbed book, Judge, it's tab is number 64 as far as the lettering, it's KKK, I show you that exhibit, Dr. Vrugink, and ask you if at page ten that survey is incorporated?

A Yes. That is the survey I was referring to.

Q It showed what, by way of approval? [1145]

A It shows that providing the non-public schools shared time services, 82 percent approval of the voters.



Q I believe that's on page ten?

A Page ten, yes.

Q I think maybe we covered this, maybe not, Dr. Vrugink, what we have described here as shared time courses, let's take them one at a time, K through 6th grades, the specialized in art, the specialized in music, the reading consultant, the math consultant, the physical education specialist, am I correct that the same courses that are taught to the shared time people are presented to the public school students?

A Yes, in most, in all cases in the elementary, they would generally have a public and a non-public school assigned, say a phys ed specialist.

Q What I'm getting at is, though, something more isn't being offered to non-public than the public school children are benefiting from?

A One of the criteria is just that, that we offer—do not offer more services than we have ourselves.

. . .

(Cross Examination by Mr. Young)

[Vol. VII A, 1148] Q Dr. Vrugink, with regard to legal requirements for graduation or for course offerings, is the Michigan system of public and elementary and secondary schools marked by a high degree of centralized control in Lansing?

A No.

Q Has the legislature through the school code authorized local school districts with locally elected board of education?

A Yes.

Q And have those local board of education been given broad discretion to meet local needs by determining such things as graduation requirements and course offerings?

A Yes.

Q So would it be fair to say that the system of public elementary and secondary education is a decentralized system? [1149]

A Yes.

Q Now, turning specifically to the sources of various requirements which may be imposed for graduation or for course offerings, first I ask you, does the State Board of Education determine graduation requirements for public schools?

A No.

Q Does the State Board of Education determine graduation requirements for non-public schools?

A No.

Q Now does the State Board of Education determine what courses must be offered by public school districts?

A No.

Q Does the State Board of Education determine what courses must be offered by non-public school districts?

A No.

Q Now to the extent that there are legal requirements for graduation or course offerings, are those imposed on public school districts by the legislature?

A Yes.

Q And to the extent that there may be graduation requirements or requirements for course offerings regarding non-public schools, is the source of those requirements legislation?

A I don't know the entire answer on the non-publics, but I assume that they would be the same.

Q All right. Now has the Michigan Legislature required that [1150] physical education must be taken in order to graduate from a public school district?

A No.

Q Has the Michigan Legislature required that physical education must be taken to graduate from a non-public school?

A No.

Q Is it true generally that graduation requirements are determined by public boards of education?

A Yes.

Q And that in the non-public sector the graduation requirements are determined by non-public boards of education?

A Yes.

Q Has the Michigan Legislature required that any music course must be taken as a condition to graduation from the public school district?

A No.

Q Has the legislature required that any music course must be taken as a condition to graduate from a non-public school?

A No, not to my knowledge.

Q Has the Michigan Legislature required that any music course must be offered at any level by a public school district?

A No.

Q Has the Michigan Legislature required that any music course must be offered at any level by a non-public school?

A No. [1151]

Q Turning to art. Is there a requirement that art must be taken to graduate from a public school district?

A No.

Q Is there a requirement that art must be taken to graduate from a non-public school district?

A No.

Q Has the Michigan Legislature required that a public school district offer any courses in art?

A No.

Q Has the Michigan Legislature required that a non-public school offer any courses in art?

A Not to my knowledge.

Q Now let's turn to remedial reading. Has the Michigan Legislature required that remedial reading must be offered by a public school district?

A No.

Q Has it required that remedial reading must be offered by a non-public school?

A No.

Q Now, will you explain for the Court the differences between remedial reading instruction and regular classroom reading instruction?

A Remedial reading is primarily what I call falls within the compensatory portion again, if that can be the word, in that there are youngsters who for one reason or another are not [1152] reading up to grade level, and therefore, you look for the difficulty, you diagnose the difficulty, and then through the use of special people have a prescription to try to improve on that reading ability. That would be primarily teaching remedial reading.

Q So then remedial reading would involve smaller classes?

A Yes.

Q With individual diagnosis and prescription by specialists?

A Yes.

Q And then the students, this small number of students in a remedial reading class, you might expect to find each one of them working simultaneously on a different assignment on each individual's needs.

A Could be depending on the prescription.

Q Has the Michigan Legislature required that remedial math must be offered?

A No.

Q By a public school district?

A No.

Q Or a non-public school?

A No.

Q Would the differences generally between remedial math and regular classroom math instruction be the same as the differences between remedial reading instruction and regular classroom reading instruction? [1153]

A Pretty much the same.

Q Now the courses that have been described as offered in community education, the before and after school portions, leisure time and enrollment, are those courses that have been required by the legislature for graduation?

A No.

Q Or are they courses that have been required that the public schools must offer?

A No.

Q Or that the non-public schools must offer?

A No.

. . .

(Cross Examination by Mr. Hubbell)

[Vol. VII A, 1161] Q As I understood your testimony, the shared time and community ed programs are offered generally to the non-public school systems or individual schools?

A Uh-huh.

Q For their acceptance or rejection?

A Yes.

Q It's up to them?

A Yes.



Q Are those programs offered to all of the various non-public schools in the district?

A They are offered to all of the people in the system. If it's community ed portion, if it's after school or if it's evening, it could be different. It may not be in every school in the evening or it may not be in the afternoon.

Q But the offer may be available at least as to shared time [1162] and the community ed afternoon courses?

A Yes.

Q And there is no preference shown to one type of school, non-public school, as opposed to another type of non-public school?

A No.

Q They are equally able to accept those courses?

A Yes.

Q Some decide not to, some take some and some take others?

A That's right.

. . .

(Statement of Plaintiffs' Counsel, Mr. Dilley)

[Vol. VIII B, 1167] We don't claim in this case that courses that are being [1168] offered in the non-public schools are not available in the public schools. And, it disturbs me that we are cluttering the record and cluttering our case with exhibits that have nothing to do with the merits of the case.

. . .

(Cross Examination by Mr. Dilley)

[Vol. VII B, 1184] A Well I don't like the word profit because we have many programs in a school system. As I indicated this morning, there are some programs where the revenue, if you broke them down, and you get as fine as you want, you can say kindergarten brings in \$1927, and you only spend so much, so that's profit, if you called it that. You could even take 1st grade and 2nd grade and 3rd grade and break it down into 45 different things. You could say remedial reading is this or that.

The facts are you have so much revenue generated out of all programs and you design as a staff and board the best program available.

Q I am not hung up on the word profit.

A Okay.

Q I am just trying to relate your revenues to your expenses and you told me that in this particular thing we are involved in in this case you do receive more tax revenues from the State of Michigan than the money that you expend for the same purpose, is that true?

A That's on the direct costs. I think I explained also this morning that many programs have allocated to them additional called indirect costs. If you want to take a portion of various programs, like business office, administration, my time, varieties of kinds of things, you can and probably ought to charge some of those against it. But we are looking at a budget here which is a direct cost budget, see.

. . .

[Vol. VII B, 1186] THE COURT: I think, witness, what I would like to know is given the makeup of the program

and the financial arrangements and the way that the state reimburses the school district, is there an incentive to increase [1187] the shared time program part of the Grand Rapids school and has that worked that way in the past, increasing because of the way that the school district is reimbursed?

THE WITNESS: That's a difficult question, Your Honor. If that were true, then there would be certain programs we wouldn't want to run, remedial reading is an example. They are small classes. We have not turned down classes that are necessary that we have had to offer, even though taking that particular program by itself may have meant a disparity between revenue and expenses.

I think on that basis I would say that we have offered the program to all non-public schools and they have had the opportunity to select it.

In some cases there is a better, if you wish, revenue producing than in other cases. I cannot recall staff ever saying to me we shouldn't have this program because it won't bring in as much revenue as another. We try to look at the total program we have offered and to say this is the program we are offering and here are the schools that want to participate in it, I think it would be read that if there is a great disparity, yes, there would be an incentive. I do not recall that as a motivating influence, however, in the years that I have dealt with it.

(Cross Examination by Mr. Hubbell)

[Vol. VII B, 1196] Q Now, the criteria, again, for participating in Title I, the two criteria are what?

A The criteria for being under Title I target area, first of all, is an economic criteria. There must be significant num-

bers of children residing in given attendance areas to allow it to be a target area for economic purposes. Once that has been determined, then [1197] the law changes to educational deprivation or educational need. So then, you serve those that educational need within that target area.

Q So, it would likewise be true, I take it, that if a student transferred in from one public school within the district outside of the Aberdeen district into Aberdeen by virtue of his own application or his parents' application but did not come from a target area, that student would not be eligible for Title I services?

A That student is not eligible, if he is outside the target area.

Q And, in that respect, the same with respect to the student attending, let's say, Blessed Sacrament.

A Yes, at the time any public school, particularly, you cannot receive them until they are in the target area.

Q Are there other reasons besides not meeting those statutory criteria and particularly, I have in mind the question of sufficient funding, other reasons why not all of the students who might have educational needs not receive the Title I services?

A Well, what the extent, I think, of the legislation is to concentrate the dollars available within areas of greatest need. No one says that there aren't many other kids out there who have needs, but when the allocation is made, the State Department through the federal government, [1198] of course, indicates that you can only serve with these concentrations. And so, you line up all the schools and cut them off based on whatever the cutoff point is.

Q And, there might, in fact, be children who have even greater educational needs even though they don't come from a target area?

A That's correct.

Q May even, in fact, come from an economically deprived home?

A Yes, very much so.

Q But, you can only serve under the formula that could be devised or perceived in that fashion by Congress?

A Yes.

Q And, is that one of the reasons why shared time addresses remedial reading and remedial math?

A Yes. And added to the fact that the dollars available even when the target areas are not sufficient to do the whole job.

. . .

THURSDAY, MAY 20, 1982  
(Vol. VIII A)

Excerpt from the trial testimony of John  
Young, having been duly sworn:

(Direct Examination by Mr. Farr)

[Vol. VIII A, 1320] A Approximately 20 days ago, 25 days ago, our office sent out a packet to each of the non-public schools. Included in that packet was the separate sheet or sheets explaining each of the shared time programs, i.e., outdoor education, math, reading, et cetera, to the non-public school. Also included in that packet, along with an explana-

tion of each of the programs were the guidelines for shared time programming and the non-public schools are asked to go through those sheets and to indicate on the sheets whether they wish to opt into the program for the following school year. When they do that, they not only let us know on a sheet that, yes, they would like to have the reading services next year, but they also let us know in the area of, for instance, physical education or music, how many students they will have, whether 23 3rd graders or 2 separate 3rd grades or whatever it is. So we can get an idea of how much, what kind of teaching staff we're going to need in the area of reading or math. They would indicate in the area of remedial reading how many teaching hours they will need in that level. Usually they put in four or five, whatever they think they are going to need, and we plan that way. If it's a new school that hasn't been with us before or if it's a school that opted into a program that has not before opted in, then I would either go myself—more likely I would ask one of the supervisors for that area to go, so that they could [1321] have the clear understanding of both the school and the supervisor of exactly what kind of service that we are going to need to provide there. Because many times they may ask for—they may not have a clear understanding of how we are going to deliver that remedial reading service and they might ask for more hours than the actual need of the school. When the form comes back, the forms come back from the various schools, I meet with all the supervisors for those various programs.

Q Such as Betty Rowlands?

A I met with Betty Rowlands for reading services. I met with Bill Oosse for outdoor math. I met with Joe Leonardo or Tony Wagner for the physical education program, et cetera, and they would get all the forms for those various programs and they could plan on their teaching staff needs for the following school year.



Q Are they the people that, then, make the assignment of teachers?

A Yes, they would assign the teachers to the various schools. Prior to the start of the school year, I would contact the various schools to make sure, once I knew how many teachers we were going to need, and we would convert those into room needs, and I would contact the non-public schools to say I need such and such a room and they would make that room available leased to the Grand Rapids Public Schools.

[1322] Q At the beginning of this past school year, did you have orientation sessions with at least a good number of the people participating in the shared time program?

A Teaching staff?

Q Yes.

A Yes, I did.

Q And as part of that orientation, did you outline what I have been referring to as the dos and don'ts, as far as going onto a non-public site?

A Yes, sir, yes, I did.

Q And I believe it's Exhibit LLL which are the guidelines that others have spoken to so far in this trial. Are those the type of things that you go over with those people at that type of an orientation?

A Absolutely.

Q And I believe we have also previously have mentioned during the course of the trial, Exhibit GGG, which I believe is a memorandum by you to Dr. Vrugink reporting to him regarding those—or at least an orientation session?

A Yes, it was early in the, early after I took the present position I'm in now. It was more of a reaching an understanding between myself and my superior as to part of my job function.

• • •

[Vol. VIII A, 1324] Q Can you advise Judge Gibson as to the number of teachers involved the—public school teachers employed by the Grand Rapids Board of Education that are involved in the shared time program?

A 131 contracted Grand Rapids Public School teachers.

Q Okay. We have had discussion during the trial of a good deal of discussion of the fact that if Catholic Central, West Catholic, Christian High School, before school or after school teachers in community ed program by and large work at those schools during the regular school day. Can you explain to Judge Gibson, please, how you go about, not only as far as the non-public schools but generally how you go about setting up a community education program?

A Based on—

Q You can draw on your experience having done that over the past few years from the Board of Education. [1325]

A Based on five years of experience in the community education program, and I might point out that when I was first hired by the Grand Rapids Schools, coming from a factory orientation, I expected to be hired, put into a classroom. When I took a job here in the school year '75-76, my first job was in a factory teaching in a supervisors training class. And I thought, what have I gotten myself into in this school system? But—

Q What factory were you teaching in?

A I was at Steelcase originally and I was at both Fisher Bodies teaching supervisors training classes. It was through a full semester before I ever saw a real classroom. Anyway, that kind of oriented me to this is not the usual education, educational system that I had formed opinions on and heard of as I had gone through my life. Well, anyway, when I got more oriented to community education, became an administrator of community education, I began a community education program. You have to realize that the entire program is completely voluntary. If you're a teacher at Aberdeen School, the kids in your area are going to come to school because they have to. And community education, no one has to go. It's voluntary. So a good deal of the program is to find a teacher. The teacher is the real key. You have to find a teacher that is very interested in teaching and also probably someone that the community as a whole or of a [1326] specific building, the audience that you're trying to reach recognizes that teacher as the expert in that field. . . . And then that person—and in community education I should also point out that once I have identified a teacher, we have kind of, we kind of form an informal contract with that teacher. We will send out, my office being community education of Coopersville, I would send out a brochure and advertise for that class but if only seven people signed up for industrial arts, that teacher is not going to teach for me.

Q Are there certain minimums of students before there will be a class?

A Yes, there are.

Q What is that number at this point in time?

A 12 this year. We don't run a class without 12 people in it.

. . .

[Vol. VIII A, 1327] A So I don't see, in my experience of five years of community education, and every place I've been, I have used the people to teach my classes who were either located in the building that I was going to teach the class in or were very well known in the community as far as community wide and regardless of where you go.

. . .

[Vol. VIII A, 1327] Q Have you found that to be true wherever you have organized community education programs?

A Because of the voluntary nature of the programs, if you want to have success in the program you really can't bring someone from someplace else that the people are not going to know, regardless of his qualifications, unless it's a particularly high interest class. The class is just simply not going to go. That's in my experience.

Q Now, I think we have touched on this before, but before any course in the community ed area is offered, am I correct that that course and material, course material has to be [1328] approved by you or somebody on behalf of the Grand Rapids Board of Education?

A We have a complete listing of the approved courses for community education by the Grand Rapids Board of Education. That's made available to teachers when we meet with teachers. We are going to go into a new building, meet a teacher, explain that to them, make it available to them. [1329]

Q As far as the community ed courses in the after school that were offered in the last few years, offered on non-public sites, the ones we have been hearing about during the course of this trial, were courses like that available at those sites before the community ed program was established at those sites?

A No, they weren't.

Q Is any community ed course that we have been talking about during the course of this trial to your knowledge required, a student must take one of those courses in order to graduate from his or her school?

A No.

. . .

[Vol. VIII A, 1331] Q All right. And, can you advise Judge Gibson as to the number of schools? I'm just talking about in this question the elementary after school program, how many schools within Grand Rapids participating in that, and then can you give him a breakdown of public and non-public numbers?

A There are 64 schools in Grand Rapids participating in the after school elementary. You are asking elementary, that would be 61 schools, elementary. 34 of those would be public, 27 non-public.

. . .

[Vol. VIII A, 1332] Q . . . Can you advise [1333] Judge Gibson as to what the dollar figure would translate into in terms of number of dollars that Grand Rapids Public Schools would not receive?

A Do you mean shared time?

Q Yes.

A It is my understanding the Grand Rapids Public Schools would lose six million dollars in state aid.

Q Now, at our request did you conduct what I will call a feasibility study having to do with rooms available or not available at the nearest non-public school to a given public school?

A Yes, I did.

Q Did you make a survey of the public schools in Grand Rapids to determine if, in fact, there was a room not being used that might be available for moving students from, say, a non-public school into that building?

A Yes. I asked—a letter went out to all the elementary public school principals of Grand Rapids through Mr. Bandy's office, who is the director of elementary education. It didn't come from me so its reference to shared time programming was not strong. They were asked in that letter to let Mr. Bandy know all the available, empty classrooms in their buildings during normal school hours.

The same letter went out to all secondary [1334] schools and secondary public schools in Grand Rapids through Mr. Dubinsky, executive director of secondary education, Grand Rapids Public Schools. When that letter came back to those two gentlemen, they relayed that to me.

Q Did we also ask you to make some determinations with regard to whether or not students do walk or would have to be bussed depending on the circumstances?

A Yes.

Q Did we also ask you to at least give your best judgment as to what the cost factor would be if the students were bussed?

A Yes.

. . .

[Vol. VIII A, 1335] Q Now, on each one of these exhibits is there a cutout, so to speak, from a map of the City of Grand Rapids showing the geographic areas of the schools in question?

A Yes. The cutout is from a larger map that we have already seen.



• • •

[Vol. VIII A, 1335] Q All right. Now, on this one it shows a distance, is that the distance estimated between Blessed Sacrament School and Aberdeen?

A Yes, it is.

Q You also show on there travel time of 15 minutes. Is that walking or how did you establish that?

A Anything under a quarter mile we assumed that the student could walk. And, if it's up to a quarter mile, it was [1336] five-minute to and five minutes from. If it was less than a quarter mile, we assumed they could get there and back in just five minutes. The other part of that 15 minutes is the class change time. The entire feasibility study deals in 15-minute times so we didn't get involved in fooling around with three and-a-half minutes. We just stuck with five minutes. If it was seven minutes, we stuck with five minutes. That gives them five minutes there and five minutes back. The remaining five minutes was to get to another class.

Q Now, you have on here the heading "program enrollment." Tell the Judge, please, what those figures represent.

A Program enrollment, this is current enrollment, students at Blessed Sacrament enrolled in art, 221; music, 221; physical education and so on, for a total of 748 children, although many of them are being served four times. That's your total enrollment.

Q All right. Then down here the heading "available public classrooms", and in this instance are there any available classrooms at Aberdeen School?

A According to the principal of Aberdeen School, he has no available, empty classes at any time during the day.

Q Am I correct, that you have shown on each one the nearest public school to the nearest non-public school?

A Yes. [1337]

Q You have a heading here, "lost instructional time". What do you mean, would you tell the Judge what that shows, please.

A It is the total enrollment in the context of contact, 748 contacts multiplied by each student's travel time, 15 minutes, and this will multiply out on a scale to 187 hours per week of lost instructional time. It's the time the kids are not in the classroom, they are walking back and forth or bussed back and forth.

Q When they are walking, the students, you show such things as child safety, such as supervision, what is the significance of that statement?

A Well, in this case, the very short walk, we are talking about a matter of minutes. Nevertheless, when children leave the public, non-public school building to come to a public school building, somebody has got to supervise them, and the question is, who is going to do that. What's that going to cost. We haven't done anything with it, obviously there, and in some situations we are talking about crossing major intersections and high traffic density areas. And, the question of children's safety certainly must be considered.

Q Let me show you two or three more, just by way of example. This is JJ-F and this one applies to Immaculate Heart of Mary, Mulick Park, am I correct? [1338]

A Yes.

Q And again, the total enrollment for Immaculate Heart is what?

A We calculated at Immaculate Heart and it was 1,837 actual contacts with public school teachers.

Q What was the result in terms of whether there was any empty space at Mulick that could be used?

A The principal at Mulick indicated she had no space at her school.

\* \* \*

[Vol. VIII A, 1338] Q This is JJ-A, this is Assumption and North Park. What did you find by way of availability there?

A Well, we have got one room available in—where from—we've got two rooms available on Monday and one all day long, one for three hours on Tuesday. We have got one available all day Wednesday, all day Thursday, all day too on Friday.

Q What is the distance between those two schools?

A Four miles.

Q And, in your judgment would that distance require bussing?

A Without a doubt.

\* \* \*

[Vol. VIII A, 1339] Q That's JJ-K, St. Adalbert-Stocking, can you describe to us what would be available at Stocking?

A Monday through Friday Stocking had one room available two and-a-half hours a day. And, I believe that's available, in that case, because this particular year Stocking only had one kindergarten and so that's available. They are available, each one, each afternoon.

Q What is the distance, I realize it is approximate, what is the distance?

A The approximate distance is one mile. It would require bussing.

Q All right. Here's another one with something available. Let's do this, this is St. Isidores-Eastern. What is the availability situation as far as Eastern is concerned?

A Eastern has one room available on Fridays. It's available all day.

Q How many students are enrolled at St. Isidores as far as the shared time?

A I have got 521 student contacts per week.

Q What is the approximate distance between schools?

A One half mile. The room holds 30 children.

Q Mr. Young, did we ask you to please try and determine out of 131 shared time teachers or teachers employed by the [1340] Grand Rapids Board of Education that are involved in the shared time program, how many of those previously were employed by one of the non-public schools that we have had discussion about in this case?

A The 131 contracted Grand Rapids Public School teachers currently teaching in the shared time daytime programming, 13 of those teachers formerly were employed by the non-public schools prior to their becoming public school teachers. Three of those people in checking their records are not employed by the Grand Rapids Public Schools teaching in the same area that they taught at.

Q What do you mean by that?

A Well, for instance, if a teacher was teaching math at West Catholic, they are not teaching math at Grand Rapids Public Schools.

Q They teach in some other area?

A They are teaching in their certified area for us.

Q Have you had a situation where one or more of the persons formerly employed by one of the non-public schools then became employed by the Grand Rapids Public Schools but then were bumped out of those positions? Have you had that occur?

A Yes.

. . .

[Vol. VIII A, 1343] Q (BY MR. FARR) Mr. Young, as a result of this study which I have characterized as a feasibility study, can you advise the Court as to whether or not it is feasible to think in terms of moving students from a non-public school facility to the public school facility for the services that are now being provided?

A It's not feasible to move all the students presently in the program to a public school.

. . .

EDITOR'S NOTE

PAGES 195 through 289 WERE POOR  
HARD COPY AT THE TIME OF FILMING.  
IF AND WHEN A BETTER COPY CAN BE  
OBTAINED, A NEW FICHE WILL BE  
ISSUED.



## GRPS Ex EE

### ELEMENTARY EDUCATION

**SCHOOL 5** - An elementary school building serving children in grades kindergarten through 5.

**RECREATION PROGRAM** - Recreates, Child Development Center, Playhouse, Open Gym, and the 100 ft. swimming pool, all open daily for children and adults.

**ARTS AND CRAFTS** - For children who need creative and artistic expression, individualized instruction.

**READING** - A program for gifted and talented students.

**SCIENCE** - A program for gifted and talented students.

**LANGUAGE** - A program for gifted and talented students.

**TELEVISION** - A program for gifted and talented students.

**LIBRARY** - A program for gifted and talented students.

**MUSIC** - A program for gifted and talented students.

**DANCE** - A program for gifted and talented students.

**THEATRE** - A program for gifted and talented students.

**SPORTS** - A program for gifted and talented students.

**CLUBS** - A program for gifted and talented students.

**ADULT EDUCATION** - A program for adults.

**ADULT RECREATION** - A program for adults.

**ADULT ARTS AND CRAFTS** - A program for adults.

**ADULT READING** - A program for adults.

**ADULT SCIENCE** - A program for adults.

**ADULT LANGUAGE** - A program for adults.

**ADULT MUSIC** - A program for adults.

**ADULT DANCE** - A program for adults.

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**ADULT SPORTS** - A program for adults.

**ADULT CLUBS** - A program for adults.

**ADULT TELEVISION** - A program for adults.

**ADULT LIBRARY** - A program for adults.

**ADULT MUSEUM** - A program for adults.

**ADULT GARDEN** - A program for adults.

**ADULT ZOO** - A program for adults.

**ADULT BOTANICAL GARDEN** - A program for adults.

**ADULT HISTORICAL SOCIETY** - A program for adults.

**ADULT ANTIQUARIAN SOCIETY** - A program for adults.

**ADULT NUMISMATIC SOCIETY** - A program for adults.

**ADULT PALEONTOLOGICAL SOCIETY** - A program for adults.

**ADULT ORNITHOLOGICAL SOCIETY** - A program for adults.

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**ADULT HERPETOLOGICAL SOCIETY** - A program for adults.

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**ADULT LITHOLOGICAL SOCIETY** - A program for adults.

**ADULT PALAEOGEOLOGICAL SOCIETY** - A program for adults.

**ADULT GEOLOGICAL SOCIETY** - A program for adults.

### SECONDARY EDUCATION

**SCHOOL 6** - A high school building serving students in grades 6 through 12.

**ADULT EDUCATION** - A program for adults.

**ADULT RECREATION** - A program for adults.

**ADULT ARTS AND CRAFTS** - A program for adults.

**ADULT READING** - A program for adults.

**ADULT SCIENCE** - A program for adults.

**ADULT LANGUAGE** - A program for adults.

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**ADULT PALAEOGEOLOGICAL SOCIETY** - A program for adults.

**ADULT GEOLOGICAL SOCIETY** - A program for adults.

### COMMUNITY EDUCATION

**High School Completion, Adult Basic Education, and Community Education** - A program for adults.

**ADULT EDUCATION** - A program for adults.

**ADULT RECREATION** - A program for adults.

**ADULT ARTS AND CRAFTS** - A program for adults.

**ADULT READING** - A program for adults.

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## GRAND RAPIDS PUBLIC SCHOOLS

"PROVIDING EDUCATIONAL OPPORTUNITIES FOR THE COMMUNITY"

### SCHOOL TIME



### RECREATION DEPARTMENT

Leisure and recreational activities available to all the children, youth, and adults of Grand Rapids.

Activity	Location	Time
YOUTH CENTER	500 S. WEST	4:00 - 8:00 PM
YOUTH CENTER	500 S. WEST	4:00 - 8:00 PM
YOUTH CENTER	500 S. WEST	4:00 - 8:00 PM
YOUTH CENTER	500 S. WEST	4:00 - 8:00 PM
YOUTH CENTER	500 S. WEST	4:00 - 8:00 PM
YOUTH CENTER	500 S. WEST	4:00 - 8:00 PM
YOUTH CENTER	500 S. WEST	4:00 - 8:00 PM
YOUTH CENTER	500 S. WEST	4:00 - 8:00 PM
YOUTH CENTER	500 S. WEST	4:00 - 8:00 PM
YOUTH CENTER	500 S. WEST	4:00 - 8:00 PM



### SPECIAL EDUCATION

Set the special programs for children with physical, mental, or emotional disabilities.

Program	Location	Time
ADULT EDUCATION	500 S. WEST	4:00 - 8:00 PM
ADULT RECREATION	500 S. WEST	4:00 - 8:00 PM
ADULT ARTS AND CRAFTS	500 S. WEST	4:00 - 8:00 PM
ADULT READING	500 S. WEST	4:00 - 8:00 PM
ADULT SCIENCE	500 S. WEST	4:00 - 8:00 PM
ADULT LANGUAGE	500 S. WEST	4:00 - 8:00 PM
ADULT MUSIC	500 S. WEST	4:00 - 8:00 PM
ADULT DANCE	500 S. WEST	4:00 - 8:00 PM
ADULT THEATRE	500 S. WEST	4:00 - 8:00 PM
ADULT SPORTS	500 S. WEST	4:00 - 8:00 PM
ADULT CLUBS	500 S. WEST	4:00 - 8:00 PM



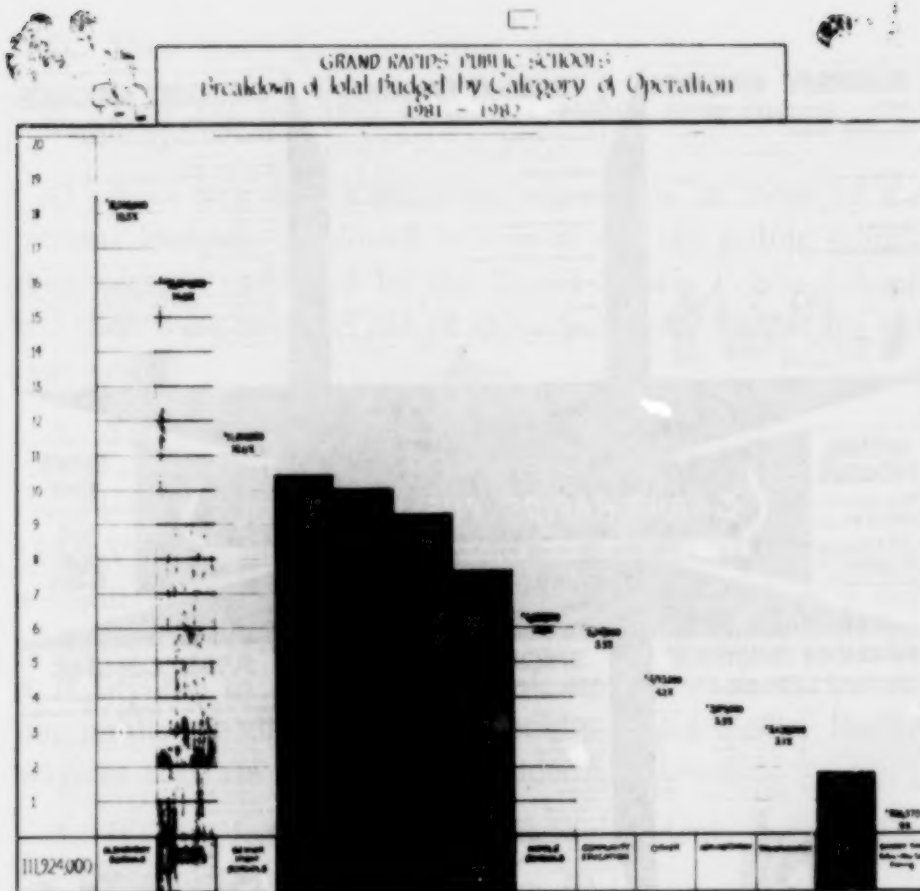
### JUNIOR COLLEGE

Educational programs providing a solid foundation for advanced study of various institutions as well as specialized vocational programs.

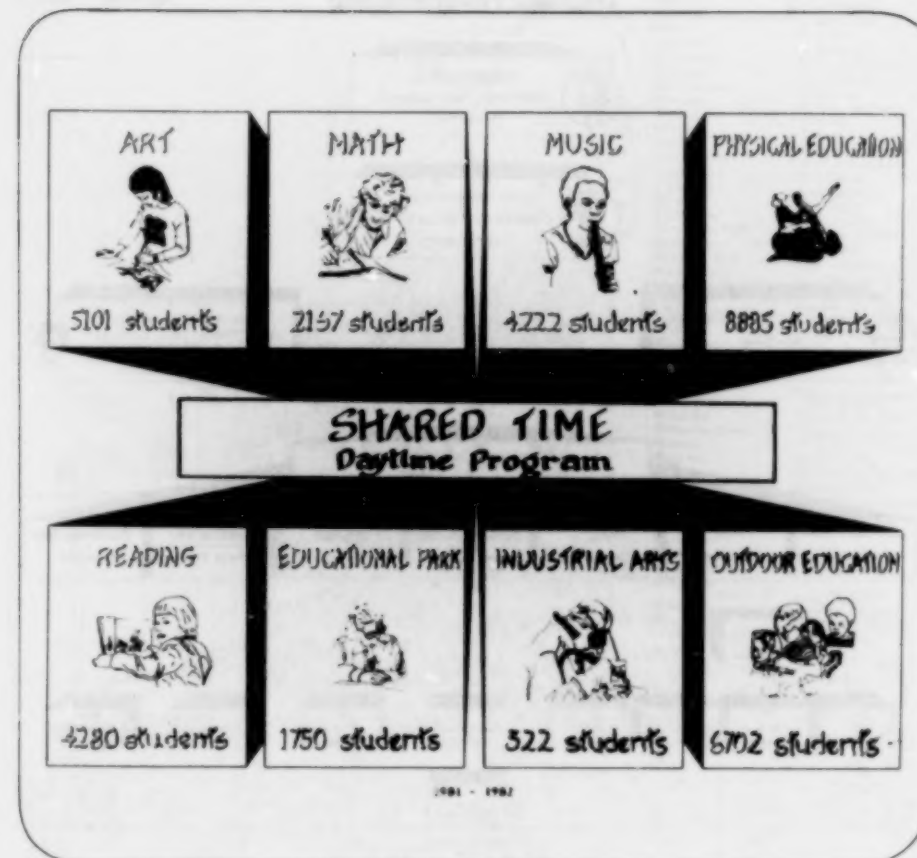
Program	Location	Time
ADULT EDUCATION	500 S. WEST	4:00 - 8:00 PM
ADULT RECREATION	500 S. WEST	4:00 - 8:00 PM
ADULT ARTS AND CRAFTS	500 S. WEST	4:00 - 8:00 PM
ADULT READING	500 S. WEST	4:00 - 8:00 PM
ADULT SCIENCE	500 S. WEST	4:00 - 8:00 PM
ADULT LANGUAGE	500 S. WEST	4:00 - 8:00 PM
ADULT MUSIC	500 S. WEST	4:00 - 8:00 PM
ADULT DANCE	500 S. WEST	4:00 - 8:00 PM
ADULT THEATRE	500 S. WEST	4:00 - 8:00 PM
ADULT SPORTS	500 S. WEST	4:00 - 8:00 PM
ADULT CLUBS	500 S. WEST	4:00 - 8:00 PM



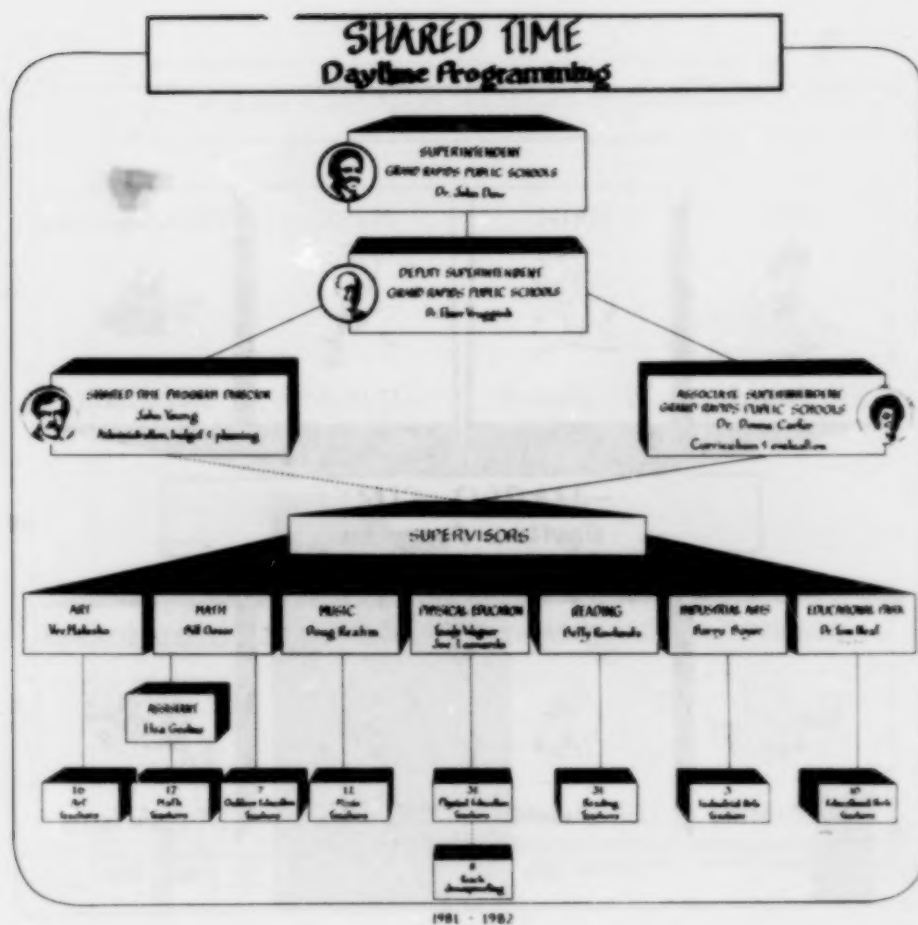
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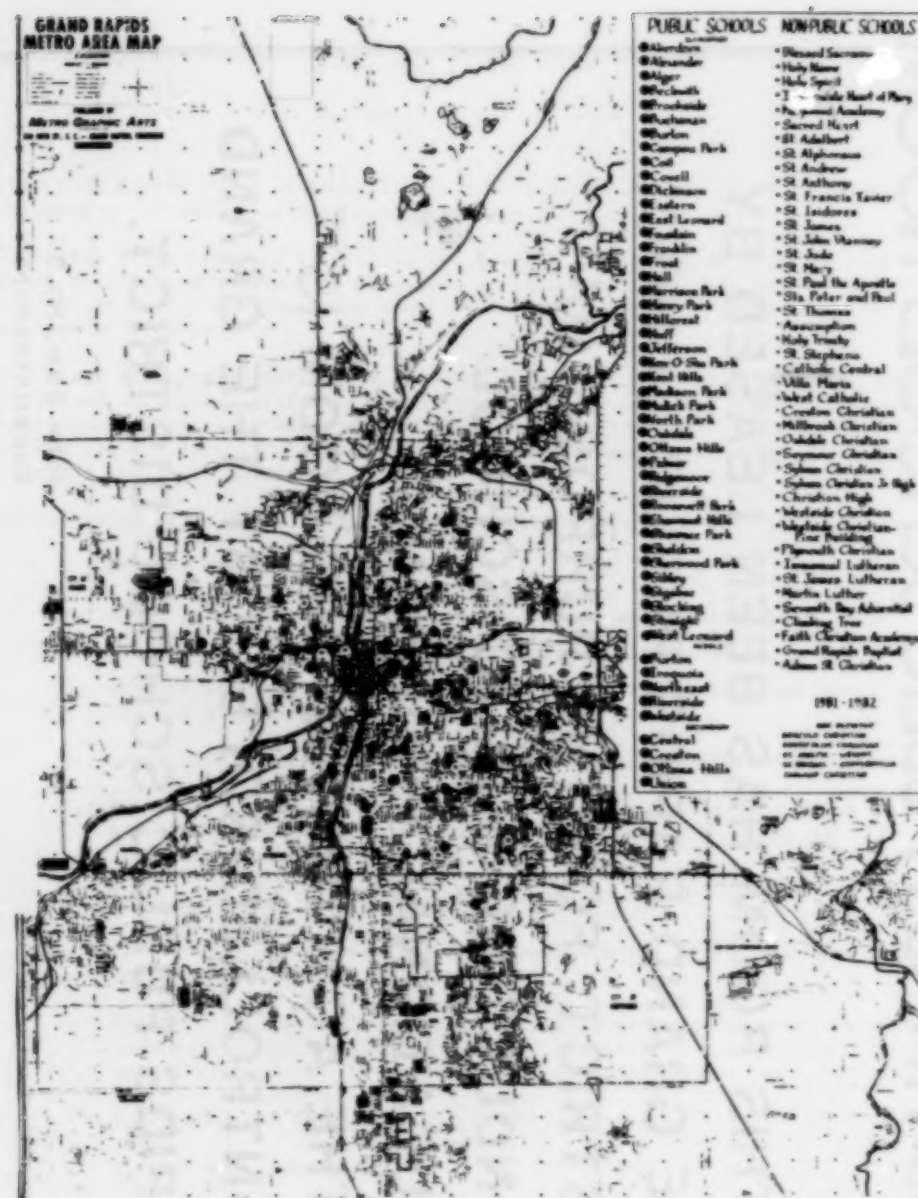
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## GRPS Ex HH



## GRPS Ex JJ





# GRAND RAPIDS PUBLIC SCHOOLS' ROOM

THIS ROOM HAS BEEN LEASED BY  
THE GRAND RAPIDS PUBLIC SCHOOL  
DISTRICT, FOR THE PURPOSE OF  
CONDUCTING PUBLIC SCHOOL  
EDUCATIONAL PROGRAMS.

THE ACTIVITY IN THIS ROOM IS  
CONTROLLED SOLELY BY THE GRAND  
RAPIDS PUBLIC SCHOOL DISTRICT.

John Dow, Ph.D.  
Superintendent

GRAND RAPIDS PUBLIC SCHOOLS

## PHILOSOPHY OF EDUCATION

### GRAND RAPIDS PUBLIC SCHOOLS

The Grand Rapids Board of Education is committed to provide for each student, an equal opportunity for a quality education.

Education is an endeavor or process which seeks to develop an excellence of mind, spirit, and attitude of which man is so uniquely capable and having as its ultimate goal the happiness and fulfillment of each individual and the welfare of society.

The Board recognizes that no two students are alike; they have differing needs, differing abilities, differing aspirations. The Board seeks the fully developed individual, maximizing his potential, talents, and interests. The Board is concerned for the exceptional child and will provide opportunities for both the talented and the handicapped.

Education in Grand Rapids Public Schools shall enable each individual to:

- A. Acquire the basic skills.
- B. Apply rational intellectual processes to the identification, consideration, and solution of problems.
- C. Develop a comprehension of a changing body of knowledge of the various disciplines.
- D. Learn good health and safety habits as well as muscle coordination.
- E. Experience an environment that will motivate and develop an inquisitive mind capable of critical and objective thinking and independent study.
- F. Progress toward a marketable skill.
- G. Realize the interdependence and common destiny of all citizens of the United States.
- H. Become a citizen who has a sense of self respect, who respects the person and rights of all others, who accepts the responsibilities and disciplines of our society, and who respects the law.
- I. Understand and deal with social problems thoughtfully and objectively.
- J. Have an opportunity for continuing education.

Education is a cooperative endeavor requiring reciprocal effort on the part of the teacher and student supported by the cooperation of parents and the community.

The Grand Rapids Public Schools shall utilize all available facilities and equipment to provide a healthful and stimulating educational environment. School facilities shall be used for the regular program, continuing education, and the community.

Policy Adopted: January 3, 1972

## GRPS Ex HHH

### AGREEMENT FOR LEASE OF SPACE FOR SHARED TIME PROGRAMS IN NON-PUBLIC SCHOOL BUILDINGS

This agreement made and entered into on the 8th day of September, 1981, between St. Alphonsus School with principal offices at 228 Carrier, N.E., Grand Rapids, Michigan 49505, hereinafter designated as LESSOR, and the Grand Rapids Public Schools, a school district of the second class, with principal offices at 143 Westvick Avenue, N.E., Grand Rapids, Michigan 49503, hereinafter designated as LESSEE.

#### Preliminary Statement

The Grand Rapids Public Schools has leased space from St. Alphonsus School to hold shared time secular classes. The leased property can be treated pro hoc vice as the property of the Grand Rapids Public School System, and is under the authority and control of the Public Schools, is operated by public school employees, and is open to all students eligible to attend public schools.

The parties have reached an understanding for the use of parts of the property and the facilities of Lessor by Lessee during the period while school is in session on scheduled school days during the school year. The Lessee will add necessary equipment to conduct classes, and the Lessor will have the privilege of using these for its purposes during the period of the lease with a right of removal on the part of the Lessee upon the termination of its occupancy. It is expected that mutual cooperation between the parties will solve problems encountered in actual operation of the plan.

#### Formal Agreement

In consideration of the foregoing and mutual promises of the parties, IT IS AGREED as follows: Lessor hereby leases to the Lessee commencing September 8, 1981 and ending June 18, 1982, academic classrooms, laboratories, or gymnasiums for the purpose of shared time educational programs.

1. Lessee shall pay the sum of six (\$6.00) dollars rent per class per week that school is in session. An additional rental, the equipment and furnishings of Lessee left at the premises during vacation periods may be used by Lessor for its purposes without charge.

2. Lessor shall provide and maintain the facilities above including all utilities, i.e., heat, electricity and water for use during the periods specified. Lessor shall supply heat sufficient to maintain the rooms at a comfortable and healthful temperature. Lessee shall use water and electricity reasonably for its stated purposes.

3. Lessee shall have control of the premises hereby leased during the periods above prescribed for its occupancy; subject, however, to such limitations and restrictions as herein otherwise provided. Any necessary modifications for health and safety as required by law will be the responsibility of the Lessor.

4. Lessee shall make repairs to its equipment and furnishings in said premises in the event of damage or destruction by fire or the elements or other acts of God. In the event of damage to the premises or equipment of Lessor caused by the agents of employees of Lessee, it shall make repairs thereof, ordinary use and wear of Lessor's property or equipment excepted.

5. Lessor shall make repairs to its premises or equipment in the event of damages by fire or the elements or other acts of God.

6. It is understood and agreed by the LESSOR that the LESSEE shall have exclusive control and administration over the physical premises subject to this lease, the curriculum, staff and students in the conduct of the public school on the premises of the LESSOR. This includes evaluation and the adoption of all rules and regulations relative to student conduct and course credit.

The staff conducting said public school shall be public-school employees and shall be subject to administrative control by the public school exclusively. All vacancies or temporary absences in staff assignments shall be filled by public-school employees.

All textbooks and supplementary materials required by the students shall be provided by the LESSEE. All rules and policies of the LESSEE applicable throughout the public school system, including the expulsion and suspension policies of the school district, shall be effective as to all students enrolled

in the public school on the LESSOR's premises. Enrollment in said shared time program shall be open to all eligible to attend the public school in accordance with the LESSEE's board policy.

7. Lessee shall not assign or sublet said premises nor make any improvements therein which might subject said premises to a mechanics lien without the specific written consent of Lessor.

8. Anything herein to the contrary notwithstanding, the Lessor shall be relieved from responsibility for supplying services in the event interruption thereof shall arise from inspection, repair, or replacement of facilities, or any event not within the control of Lessor.

9. Lessee will save and hold the Lessor harmless from any and all liability for damages to persons or property arising out of Lessee's use of the premises which are caused by the negligent action or failure to act by Lessee or its officers and employees.

10. This agreement shall be extended on a year-to-year basis unless either party notifies the other in writing that the agreement will be terminated on ninety (90) days prior to the end of the school year.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed, respectively by the officials legally authorized so to do, and their corporate seals to be affixed, upon the date above specified.

GRAND RAPIDS PUBLIC SCHOOLS

By Lawrence P. Jester  
Its President

By Marion E. Bailey  
Its Secretary

ST. ALPHONSE SCHOOL

By Jeffrey M. Ziemann

By \_\_\_\_\_

GRPS Ex III

**AFFIDAVIT OF ROSEMARY ALLAND IN  
OPPOSITION TO PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION AND PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

STATE OF MICHIGAN }  
COUNTY OF KENT } ss.

Rosemary Alland, being first duly sworn, deposes and says:

1. I am President of the Board of Education of the Grand Rapids Public Schools.

2. I am making this Affidavit on behalf of the Board of Education of the Grand Rapids Public Schools in opposition to plaintiffs' motion for Preliminary Injunction and plaintiffs' motion for Summary Judgment, and further, if sworn as a witness, I can and could testify competently concerning the matters hereinafter set forth.

3. I have been a member of the Board of Education since July of 1969, and a resident of the City of Grand Rapids since June of 1967.

4. The Shared-Time courses and instruction offered by the Grand Rapids Public Schools have not been a politically divisive issue between the members of the Board of Education, nor has it been an issue in any school board election campaign, or in a school millage election campaign. I do not believe the Shared-Time program has been a divisive issue in the community. In fact, it is my belief that the program has been very successful and that it has been well received by the entire community.



5. The program itself is designed and intended to provide secular educational opportunities, on a supplementary basis, to all eligible students in the district who wish to participate and take advantage of such opportunities.

[Jurat and Signature Omitted in Printing]

GRPS Ex JJJ

**AFFIDAVIT OF JOHN YOUNG REGARDING  
1981-82 ELEMENTARY COMMUNITY EDUCATION**

**DATED MARCH 26, 1982**

(Caption Omitted in Printing)

STATE OF MICHIGAN }  
COUNTY OF KENT } ss.

Mr. John Young, being first duly sworn, deposes and says:

1. That he is presently employed by the Board of Education of the Grand Rapids Public Schools, a school district of the second class, as Director of the shared time program.

2. That if called to testify in this cause, he could testify competently and truthfully concerning the matters herein-after set forth.

3. That the attached Exhibit A contains a complete listing by course title, of every before or after school class offered by the Board of Education of the Grand Rapids Public Schools in the program, both for the Fall semester of 1981 and the Spring semester of 1982.

4. That, as a review of the Exhibit discloses, the nature or types of instructional opportunities offered and provided in the before and after school program in no way parallel the nature or type of the instructional offerings provided during the regular school day. Indeed, all of the courses offered on the elementary level represent "leisure time" courses, enrichment in nature. The same rule applies to many of the courses offered on the secondary level.

5. That further your deponent sayeth not.

[Jurat and Signature Omitted in Printing]

**EXHIBIT A**

**CATHOLIC ELEMENTARY AFTERSCHOOL PROGRAM**

**Fall, 1981**

**Assumption**

Class Title  
Ceramics  
Arts and Crafts  
Cake Decorating  
Model Building  
Stitchery  
Oil Painting  
Oil Painting  
Home Economics

**Blessed Sacrament**

Spanish  
Cooking  
Gymnastics  
Rug Hooking

**Holy Spirit**

Yearbook Production  
Dough Modeling  
Christmas Macrame  
Dough Modeling  
Needlecraft  
Christmas Arts and Crafts

**Holy Trinity**

Bowling  
Bowling

**Immaculate Heart of Mary**

Fundamentals of Basketball  
Math and Reading Games—  
Grade 1

**Immaculate Heart of Mary  
(Continued)**

Math and Reading Games—  
Grade 2  
Math and Reading Games—  
Grades 3 & 4  
Recreational Games  
Counted Cross Stitch  
Quilting

**Marywood Academy**

Arts and Crafts  
Model Building  
Gymnastics

**Sacred Heart**

**Class Title**

Physical Activities  
Ceramics  
Physical Activities  
Model Building  
Cooking  
Rug Hooking  
Bowling  
Bowling

**Holy Name**

Cooking  
Cooking  
Arts and Crafts  
Drama  
Drama

**St. Alphonsus**

Physical Activities  
Rug Hooking  
Newspaper  
Model Building  
Puppetry and Printmaking

Creative Stitchery  
Bowling  
Jazz Band  
Track Club

**St. Andrews**

Physical Education  
Stitchery  
Educational Games  
Educational Games  
Band  
Physical Education  
Rug Hooking  
Model Building

**St. Francis**

Bowling  
Cooking  
Cooking  
Arts and Crafts  
Gymnastics  
Gymnastics  
Dance  
Arts and Crafts  
Bowling

**Climbing Tree**

**Class Title**

Cooking  
Arts and Crafts  
Model Building

**St. James**

Puppetry  
Model Building  
Gymnastics  
Gymnastics  
Arts and Crafts  
Sewing

**St. James—(Continued)**

Guitar  
Puppetry  
Arts and Crafts  
Basketball  
Cooking  
Guitar

**St. Joseph—Wright**

Physical Activities  
Rug Hooking  
Physical Activities  
Volleyball  
Physical Activities

**St. Isidores**

Model Building  
Arts and Crafts  
Model Building  
Beginning Baton  
Girls Basketball

**St. Jude**

Artex  
Model Building  
Cooking

**St. Mary**

Latch Hooking  
Art  
Drama

**St. Michael**

**Class Title**  
Arts and Crafts  
String Art  
Model Building  
Model Building

**SS. Peter & Paul**

Macrame  
Arts and Crafts  
Arts and Crafts  
Bowling  
Physical Activities  
Educational Games  
Model Building

**St. Paul the Apostle**

Modern Dance  
Candle Making  
Model Building  
Arts and Crafts  
Arts and Crafts  
Cooking  
Sewing  
Calligraphy  
Modern Dance  
Humanities  
Modern Dance

**St. Stephen**

Bowling  
Play Class  
Crocheting  
Cooking  
Basketball  
Batik  
Chess  
Cooking  
Rug Hooking  
Model Building  
Math and Reading Games  
Gymnastics  
Arts and Crafts  
Board Games  
Sculpture  
Math and Reading Games

**St. Thomas**

**Class Title**

Arts and Crafts  
Arts and Crafts  
Model Building  
Needlepoint  
Crocheting  
Educational Games  
Creative Dramatics

**St. John Vianney**

Macrame  
Model Building  
Painting  
Stitchery  
Dancing—Creative Movement I  
Dancing—Creative Movement II  
Cooking  
Weaving

**CHRISTIAN ELEMENTARY AFTERSCHOOL PROGRAM**

**Fall, 1981**

**Sylvan Christian School**

**Class Title**

Puppetry  
Tumbling  
Sewing  
Macrame  
Country Painting—2 classes  
Sewing/Cooking  
Woodworking  
Model Building  
Cooking/Puppetry  
Puppetry  
Sewing—2 classes  
Cooking  
Craft Corners/Country Painting  
Leathercraft

**Millbrook Christian**

Model Building  
Leathercraft  
Cooking

**Seymour Christian**

Model Building  
Computers  
Cooking  
Sewing  
Model Rocketry  
Computers

**Oakdale Christian**

Yearbook  
Plants  
Leathercraft  
Sewing

**Creston Christian**

**Class Title**

Puppetry  
Macrame  
Woodworking  
Sewing  
Puppetry  
Model Building

**Westside Christian**

Nature Appreciation  
Cooking  
Mini Soccer  
Arts and Crafts

**CATHOLIC ELEMENTARY AFTERSCHOOL PROGRAM**

**Spring, 1982**

**Assumption**

**Class Title**

Ceramics  
Oil Painting  
Model Building  
Cake Decorating  
Needlecraft  
Oil Painting, Advanced  
Arts and Crafts

**Marywood Academy**

Nature Crafts  
Model Building

**Sacred Heart**

Electronics  
Physical Activities  
Cooking  
Magic

**Blessed Sacrament**

Ice Skating  
Ice Skating  
Gymnastics  
Rug Hooking

**Bowling**

**Bowling**

Storytelling and Bookmaking  
Storytelling and Bookmaking

**Holy Spirit**

Drawing and Sketching  
Baking and Decorating  
Country Painting  
Dough Modeling

**Holy Name**

Cooking  
Drama  
Drama  
Cooking

**Holy Trinity**

Bowling  
Bowling

**St. Alphonsus**

Model Building  
Volleyball  
Stitchery  
Stuffed Animals  
Bowling

**Immaculate Heart of Mary**

Volleyball  
Math and Reading Games—  
Grade 1  
Math and Reading Games—  
Grade 2  
Math and Reading Games—  
Grades 3 & 4  
Recreational Games  
Counted Cross Stitch  
Electronics

**St. Andrews**

Music  
Educational Games  
Educational Games  
Rug Hooking  
Model Building



**St. Francis**

Cooking  
Arts and Crafts  
Arts and Crafts  
Gymnastics  
Gymnastics  
Dance  
Racquetball

**St. Isidores**

Arts and Crafts  
Quilting  
Baton Twirling  
Model Building

**St. James**

Puppetry  
Guitar  
Gymnastics  
Guitar  
Arts and Crafts  
Sewing  
Model Building  
Cooking  
Basketball  
Arts and Crafts  
Guitar  
Puppetry

**St. John Vianney**

Model Building  
Macrame  
Painting  
Weaving  
Dance  
Stitchery  
Dance  
Arts and Crafts

**St. Joseph—Wright**

Arts and Crafts  
Rug Hooking  
Creative Activities  
Arts and Crafts

**St. Jude**

Crocheting  
Model Building  
Cooking

**St. Mary**

Physical Activities  
Educational Films

**St. Michael**

Educational Games  
Sand Painting  
Art—Sand Painting  
Model Building  
Physical Education

**SS. Peter & Paul**

Arts and Crafts  
Poupourri  
Bowling  
Physical Activities  
Educational Games  
Educational Games  
Model Building

**St. Paul the Apostle**

Dance  
Physical Activities  
Hobby Class  
Modern Dance  
Cooking  
Spanish  
Modern Dance  
Humanities  
Calligraphy

**St. Stephen**

Tumbling  
Crocheting  
Jogging  
Gymnastics  
Bowling  
Model Making  
Clay Crafts  
Basketball  
Cooking  
Board Games  
Outdoor Recreation  
Cartoons  
Exercise  
Arts and Crafts  
Cooking/Dance

**St. Thomas**

Model Building  
Needlepoint  
Arts and Crafts  
Arts and Crafts  
Crocheting  
Educational Games  
Creative Dramatics

**Climbing Tree**

Cooking  
Arts and Crafts  
Pottery

**CHRISTIAN ELEMENTARY AFTERSCHOOL PROGRAM**

**Spring, 1982**

**Sylvan Christian School**

Creative Dramatics  
Drama  
Creative Dramatics  
Gymnastics  
Gymnastics  
Play  
Country Painting  
Drama  
Woodworking  
Model Building  
Sewing  
Cooking  
Craft Painting/Pottery

**Westside Christian**

Outdoor Appreciation  
Puppetry  
Cooking  
Art

**Creston Christian**

Puppetry

**Woodworking**

Puppetry  
Model Rocketry

**Millbrook Christian**

Drama Production  
Costumes and Make-up  
Child Care  
Sets and Design

**Seymour Christian**

Computers  
Cooking  
Sewing  
Guitar  
Computers

**Oakdale Christian**

Mini Basketball  
Yearbook  
Leathercraft  
Sewing  
Music Enrichment

GRPS Ex LLL

GRAND RAPIDS PUBLIC SCHOOLS

GRAND RAPIDS MICHIGAN

SHARED TIME GUIDELINES

1. The Shared Time is a Grand Rapids Public Schools program providing supplemental instruction to meet the educational needs of children.
2. The Shared Time program is a program taught by public school teachers who are hired by, assigned by and, if necessary, fired by the Grand Rapids Public Schools--non public personnel have absolutely nothing to do with such matters. Shared Time teachers follow Grand Rapids Public Schools work calendar.
3. Teachers in the Shared Time program are employees of the Grand Rapids Public Schools, supervised and evaluated by the Grand Rapids Public Schools only. Non public personnel have no role whatsoever in the supervision and evaluation process.
4. Due to space considerations, economic considerations, and educationally-motivated convenience considerations, the Shared Time program is operated and made available in publicly leased classrooms, clearly marked and designated as such. Grand Rapids Public Schools classrooms are to be provided by the non public schools, stripped of all religious materials or symbols.
5. Teachers in the Shared Time program are required to provide instruction based upon the guides and objectives of the Grand Rapids Public Schools curriculum. The purpose of the Shared Time program is to provide supplementary, non core, secular teaching to meet the educational needs of children. The Shared Time curriculum does not and may not parallel the non public school curriculum.
6. All materials, supplies, books, equipment and the like, utilized in providing the Shared Time program must be purchased by or supplied by the Grand Rapids Public Schools. Such materials/supplies/equipment should be:
  - a. labelled as Grand Rapids Public Schools property;
  - b. stored in locked cabinets or closets when not in use;
  - c. inventoried regularly;
  - d. segregated from materials/supplies/equipment of non publics; and
  - e. used only by public school Shared Time teachers.
7. Students: All Shared Time students are treated as Grand Rapids Public Schools students. They are graded, disciplined, etc. as Grand Rapids Public Schools students.

GRPS Ex TTT



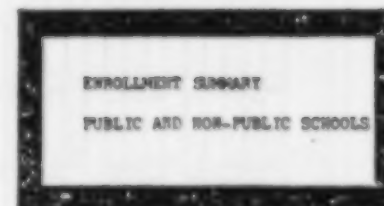
ATTENDANCE WORKERS  
GUIDANCE & COUNSELING  
RESIDENT & TUITION PERMITS  
STUDENT ACCOUNTING  
STUDENT ARCHIVES  
(HISTORICAL)  
STUDENT ASSISTANCE  
PROGRAM  
STUDENT TRANSFER  
REQUESTS  
STUDENT SUSPENSION  
REVIEW  
WORK PERMITS  
INFORMATION:

A Verification  
B Date Notarization  
Child Abuse Law & Policy  
Class Reports  
Course Titles & Numbers (Sr.)  
Disaffiliation (drop-outs)  
Emancipation of Minors  
Enrollment of Immigrants  
Graduation Requirements  
PEB Enrollment  
School Boundaries  
Student Mobilities  
Student Records Law & Policy  
Student Rights  
Student Suspension



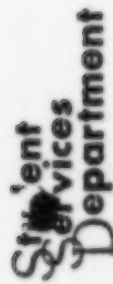
John Dow, Superintendent

# REPORT



Date: OCTOBER 2, 1981

Distribution: SUPERINTENDENT  
CABINET  
RACIAL BALANCE/  
BUILDING UTILIZATION  
COMMITTEE



GRAND RAPIDS PUBLIC SCHOOLS

ELEMENTARY  
1981-82

October 2, 1981

ELEMENTARY SCHOOLS

	FTE						HEADCOUNT		
	K	1	2	3	4	5	REG.	SP. ED.	PK
<b>TOTAL</b>									
XAE AMERSON	52	47	45	59	42	64	347	60	407
XBE ALEXANDER	72	47	46	60	54	55	384		384
ACE ALGER	51	60	55	57	52	77	389	48	411
BAE BECKWITH	43	38	38	40	41	37	275	5	280
BBE BROOKSIDE	38	42	43	36	43	40	287	59	346
BCE BUCHANAN	59	61	52	63	45	49	329		329
BEE BURTON ELEM.	73	79	45	73	58	75	523	11	576
CAE CAMPBELL PARK F.T.		175	139				314		314
CBE COTY	44	38	41	22	36	25	229	8	233
CEE COVELL	43	41	54	44	35	60	338		338
DAE DICERSON	41	39	40	50	42	39	287		287
EAE EAST LEONARD	43	42	43	40	29	38	275	39	314
EEL EASTLAWN	62	46	49	52	45	57	372	121	493
FAE FOUNTAIN & Montessori	64	44	40	36	33	27	280	8	345
FBE FRANKLIN	22	25	28	28	28	41	182	38	245
FCE C.A. FROST							106		106
HAE HALL	51	59	65	64	45	66	400		400
HBE HARRISON PK. ELEM.	52	48	54	44	36	47	317	16	365
HCE HENRY	77	45	34	59	56	56	372		412
MOE MILLCREST	41	53	49	57	57	63	369		369

GRAND RAPIDS PUBLIC SCHOOLS

ELEMENTARY  
1981-82

ELEMENTARY SCHOOLS CONT'D

	FTE						HEADCOUNT		
	K	1	2	3	4	5	REG.	SP. ED.	PK
<b>TOTAL</b>									
REE HUFF	28	21	31	26	30	27	203	17	220
JAE JEFFERSON	24	19	26	27	35	30	181		208
KAE KEN-O-SHA PARK	35	40	27	24	30	30	219	75	294
ACE KENT HILLS	40	52	43	55	43	42	317	36	353
MAE MADISON PARK	80	47	38	67	60	69	423	43	466
PAE PALMER	46	32	40	34	35	27	256	73	329
NAE NORTH PARK ELEM.	44	46	38	47	66	50	347	9	356
OAE OAKDALE	62	40	42	49	54	52	352		350
TCE OTTAWA HILLS ELEM.	46	48	34	33	26	42	257	30	346
PAE PALMER	54	54	63	52	45	50	359		401
RAE RIDGEMOOR	55	38	47	34	39	39	292		292
RBE RIVERSIDE ELEM.	47	46	48	46	60	59	370		370
RCE ROOSEVELT PARK	83						83		125
SAE SHAWMUT HILLS	23	25	36	19	33	42	220	10	230
SBE SHARPEE PARK	64	34	37	30	27	41	266	106	74
SCE SHELTON	49	29	24	50	35	35	263	6	127



GRAND RAPIDS PUBLIC SCHOOLS  
Secondary Schools  
1981-82

October 2, 1981

HIGH SCHOOLS

	FTE					HEADCOUNT		
	7	8	9	10	11	12	PRO RATE	TOTAL
CAH CENTRAL HIGH			489	276	347	281	7.12	1400.1
CBH CRESTON HIGH			485	369	407	369	16.8	1666.8
DAH OTTAWA HILLS HIGH			419	354	397	308	32.4	1510.4
DAH UNION HIGH			527	342	347	317	24.1	1357.1
EDUCATIONAL PARK							1.8	1.8
SUBTOTAL			1920	1361	1498	1275	82.22	8136.2

MIDDLE SCHOOLS

BRJ BURTON MIDDLE	237	226						473
TAM TROUDS MIDDLE	322	267						589
NAJ NORTHEAST MIDDLE	437	371						808
REJ RIVERSIDE MIDDLE	314	307						621
WDM WESTWOOD MIDDLE	327	331						658
SUBTOTAL	1637	1512						3149

ALTERNATIVE SCHOOLS

TOPS CITY SCHOOL	98	64	48	22	48	42		332
PAS PARK SCHOOL			11	22	29	27		89
SCS STREET ACADEMY	2	4	17	20	19	4		66
MAIS WALBRIDGE ACADEMY	15	47	63	57	41	17		240
SUBTOTAL	115	115	139	131	137	90		727

TOTAL	1752	1827	2058	1682	1635	1365	82.2	10012.2
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\*Because of the transfer of full and partial FTE memberships to Special Education from General Education and from General Education to Special Education, the following memberships have been claimed for Secondary Regular and Alternative Schools: 10351.3

GRAND RAPIDS PUBLIC SCHOOLS  
SPECIAL ED SCHOOLS  
1981-82

RES ARMY EDUC. CENTER - WELLERWOOD								168
LAS LINCOLN SCHOOL								276
LBS LINCOLN DEVELOPMENT CENTER								136
LCS LINCOLN ADULT ACT. CENTER								163
CS KEN-U-SHA PRE-SCHOOL								283
SAS ST. JOHN'S SPECIAL								8
WAK WAALKES JUV. CENTER								22
TAS TRANSITIONAL SCHOOL								5
TOTAL								1062

ps08-1-19

Total claimed membership for Special Education: 2326.1

**GRAND RAPIDS NON-PUBLIC SCHOOLS**  
1981-82

October 2, 1981  
Grade School

PK	K	1	2	3	4	5	6	7	8	9	10	11	12	Total
K-8 ST. ADALBERT	23	27	21	21	25	22	32	26	30	--	--	--	--	227
K-9 ADAMS STREET PROT. REF.	25	11	17	17	8	13	12	16	13	11	--	--	--	143
K-9 BLESSED SACRAMENT	22	18	21	28	27	24	24	33	24	--	--	--	--	221
K-5 MICHIGAN OAK BAPTIST ACADEMY EL.	33	25	15	15	10	16	--	--	--	--	--	--	--	114
K-8 CRESTVIEW BAPTIST ACADEMY EL.	50	53	54	60	50	60	60	--	--	--	--	--	--	387
7-12 BAPTIST ACADEMY SECONDARY	--	--	--	--	--	--	--	50	79	90	79	89	85	472
9-12 CATHOLIC CENTRAL HIGH	--	--	--	--	--	--	--	--	243	267	211	207	--	928
K-9 CHESTON CHRISTIAN	72	40	51	41	51	44	40	41	45	36	--	--	--	461
10-12 GRAND RAPIDS CHRISTIAN HIGH	--	--	--	--	--	--	--	--	--	--	254	266	271	791
PK-7 CLIMBING TREE	40	11	11	4	1	3	3	2	--	--	--	--	--	79
K-8 ST. ISIDORE	14	13	11	13	12	13	15	16	10	--	--	--	--	112
K-8 ST. PETER & PAUL	--	11	17	8	16	8	16	17	11	--	--	--	--	111
K-9 WESTVIEW CHRISTIAN	83	62	73	53	59	53	62	58	60	55	--	--	--	618
K-8 ST. FRANCIS XAVIER	25	20	22	20	16	22	13	28	17	--	--	--	--	183
K-12 FAITH CHRISTIAN ACADEMY	9	4	5	3	5	4	3	1	3	3	4	1	1	46
K-8 HOLY SPIRIT	33	30	35	30	48	53	32	30	30	--	--	--	--	317
K-8 IMMACULATE HEART OF MARY	41	51	42	42	42	55	63	45	43	--	--	--	--	474
S-8 IMMACULATE LUTHERAN	--	--	--	--	--	9	4	5	8	--	--	--	--	26
K-8 ST. JAMES CATHOLIC	40	31	31	28	37	30	28	46	22	--	--	--	--	293
K-4 ST. JAMES LUTHERAN	6	11	11	8	11	--	--	--	--	--	--	--	--	47
K-8 ST. ALPHONSUS	50	27	29	24	40	41	38	43	33	--	--	--	--	325
K-8 ST. MARY	15	18	22	18	13	18	15	12	14	--	--	--	--	145
PK-8 MARYWOOD ACADEMY	56	27	28	30	31	26	24	21	22	22	--	--	--	237
K-8 MARTIN LUTHER	13	11	15	10	8	16	7	9	7	--	--	--	--	96
K-9 HILLBROOK CHRISTIAN	25	19	15	16	21	21	18	16	50	38	--	--	--	280
K-8 ST. ANTHONY	--	30	30	30	28	30	30	30	30	--	--	--	--	238
K-9 OAKDALE CHRISTIAN	53	49	53	39	36	49	30	35	30	39	--	--	--	421
K-8 ST. PAUL	24	25	29	20	13	24	26	30	26	--	--	--	--	215
K-10 PLYMOUTH CHRISTIAN	22	24	26	26	15	19	23	14	18	14	12	--	--	215
K-6 POTTER'S HOUSE CHRISTIAN	--	8	3	1	1	3	2	--	--	--	--	--	--	16
K-8 ST. ANDREW	50	21	23	24	19	26	22	22	19	--	--	--	--	276
K-8 SACRED HEART	28	26	25	20	19	16	29	24	12	--	--	--	--	199
K-10 SEVENTH DAY ADVENTIST (G.M. J.M.A.)	--	10	7	6	16	14	12	8	11	8	--	--	--	103
K-6 SEYMOUR CHRISTIAN	61	50	49	41	33	35	39	--	--	--	--	--	--	308
PK-8 ST. THOMAS	23	20	18	22	19	24	18	29	31	20	--	--	--	274
K-8 ST. JUDE	33	29	23	30	29	30	40	29	19	--	--	--	--	262
7-12 VILLA MARIA	--	--	--	--	--	--	--	1	5	8	8	2	1	25
9-12 WEST CATHOLIC HIGH	--	--	--	--	--	--	--	--	277	302	279	273	273	1111
K-9 SYLVAN CHRISTIAN	67	63	64	49	60	68	68	64	68	41	--	--	--	612
SPEC. CHRISTIAN LEARNING CENTER	37	--	--	--	--	--	--	--	--	--	--	--	--	37
TOTALS	156	948	872	902	797	815	881	856	864	707	884	834	828	11,362

00160700

**GRAND RAPIDS PUBLIC SCHOOLS**

**MEMBERSHIP AND PERCENT OF MEMBERSHIP IN PUBLIC  
AND NON-PUBLIC SCHOOLS (K-12)**

Fourth Friday  
October 2, 1981

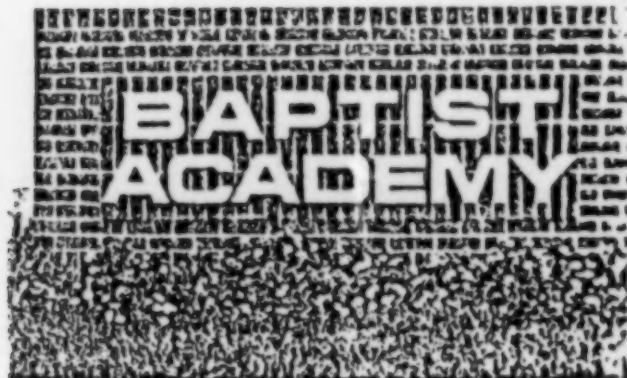
School Year	Public School Membership	Non-Public Membership	Total Membership	Percent Non-Public
1971-72	34,468	14,641	49,109	29.8
1972-73	33,902*	13,942	47,844	29.1
1973-74	32,688*	13,301	45,989	28.9
1974-75	31,785*	12,854	44,639	28.8
1975-76	31,221*	12,530	43,751	28.6
1976-77	30,658*	11,997	42,655	28.1
1977-78	29,486*	11,460	40,946	28.0
1978-79	27,636*	10,825	38,461	28.2
1979-80	26,923*	10,667	37,590	28.4
1980-81	26,318*	10,757	37,075	29.0
1981-82	26,142*	11,362	37,504	30.3

\* Individual Student Head Count - not pro-rated.

# Grand Rapids Baptist Academy

Grand Rapids, Michigan

Founded in 1972 Grades K - 12



*"The fear of the Lord is the beginning  
of wisdom..."* Proverbs 9:10

## GRAND RAPIDS BAPTIST ACADEMY HISTORY

In the spring of 1972, at the approval of the Galilean Baptist Mission, a group of 18 men met to discuss the possibility of establishing a Grand Rapids Baptist Day School. These men were led together by God because they shared the earnest conviction that their children should have a Christian education. They wanted their children taught to see all of life in the light of God's Word, including academic subjects, music, the arts, athletics, and social activities. It was their desire that their children would be educated to do all things as unto the Lord, heartily. They were also committed to founding a strong academic school.

In July of 1972, the facilities of the Wealthy Street Baptist Church were secured for housing the Baptist Day School which would open in September. That fall, 90 students enrolled in grades kindergarten through 8, with a teaching staff of 5 full time teachers. The budget for the year was \$45,000. The first of many steps of faith in the history of the school had proven that God's Hand was upon this ministry.

In the spring of 1973, property was purchased on Leonard Street and an 18,000 square foot facility was constructed to house our K-10 program. Each successive year a grade was added until 1976 when our first 12th grade class graduated with praise to God and thanksgiving for the sacrifices of many of His people on behalf of our school.

In 1978, the board took another step of faith in believing that nothing is too hard for God, as in Jeremiah 3:17 the board purchased a beautiful educational facility from the Grand Rapids Public School System. Crestview Elementary along with 7½ acres were purchased to accommodate our growing enrollment. School opened in the fall of 1978 with the total enrollment of over 700 students.

Today, Baptist Academy has over 800 students enrolled in our student body. Three facilities are presently being used to accommodate our program. Two additional facilities are in the planning or construction states which will accommodate additional elementary schools. The board is actively planning an additional high school facility that will accommodate our growing needs on that level. It is anticipated that by 1982, Baptist Academy will have an additional high school facility that will accommodate our expanding program. God's faithfulness has been apparent in providing personnel as well as property. It is the continued purpose of Baptist Academy to honor Jesus Christ, believing that an education which Christ is central will influence an entire course of a student's life.





# **PURPOSE**

It is the purpose of Grand Rapids Baptist Academy to provide a sound academic education integrated with a Christian view of God and the world. The Bible is clear in stating the principles which underlie Christian education. The apostle Paul gave a comprehensive principle when he wrote of Christ, "For by Him were all things created, that are in heaven, and that are in the earth... and He is before all things and by Him all things consist." (Colossians 1:16 & 17) The apostle John said, "all things were made by Him, and without Him was not anything made that was made." (John 1:3)

There is an important difference between Christian viewpoints on a given subject. Even though knowledge is factually the same for both, no subject can be taught in the totality of its truth if the creator, Christ, is ignored or denied. Christ is the key to education.

The approach to education which uses the Bible as the true vantage point for life and learning is the only one which honors God.

Parents of students in Baptist Academy believe that the Word of God makes them responsible for the education of their children in school, as well as in the home and in the church. They want their children educated at school with a consciousness that all truth is God's truth including history, science, mathematics, language, and the arts. They also want their children to develop a system of values consistent with the Bible, a life style which will be pleasing to God. Therefore, Grand Rapids Baptist Academy purposes to work in harmony with the Christian home, not in opposition to the teaching of the home.



#### OWNERSHIP AND OPERATION

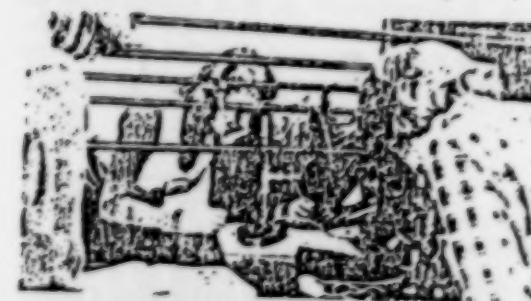
The school is governed by an 18 member board of trustees. These board members shall be in good standing of churches which subscribe to our Biblical position. One third of the board is composed of pastors and two thirds laymen. Each year, six of the board members are elected to a three year term at the Annual Baptist Academy Association meeting in June. Each Baptist church that contributes \$500 or more per year from their annual budget may send a voting delegate to the Association. Additional delegates are appointed based on the student enrollment in Baptist Academy from the respective church. (One delegate for every 10 students).

Approval of the annual budget is an important responsibility of the board. The board also establishes the tuition scale, salary schedules, and approves the hiring of personnel. Ten working committees facilitate the functions of the school board. Because the board is a policy making group, it leaves the daily operation of the school to the administrators.

Baptist Academy is financed by tuition and gifts. The tuition approximates faculty salaries and educational expenses. Gifts are needed for the capital funding of our facilities.

#### FACULTY

All teachers are approved and certified by the State of Michigan and registered through the Kent Intermediate School District. Each teacher is a Born Again educator who is competent academically and who is alert to the spiritual needs of the children.



# ELEMENTARY SCHOOL K-6

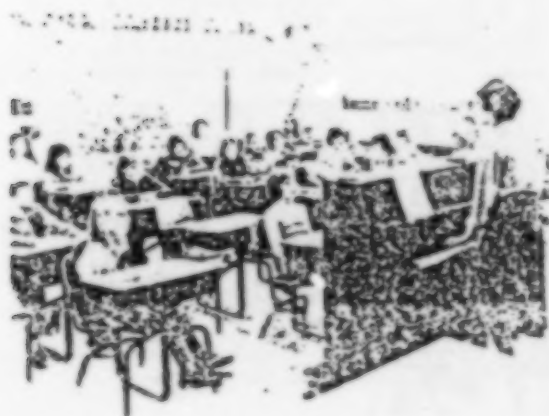
Since children are impressionable, the school believes that they need to be educated in the truth in their early, formative years. Kindergarten is considered important. There is a strong emphasis on reading readiness, mathematical concepts, music, art and Bible. The children learn how to work and play as member of the group.

The elementary school subjects include Bible, reading, phonics, mathematics, social studies, science, art, music, and physical education. Reading and mathematics are emphasized and good study habits are formed.

The teachers work closely with the students and their parents to correct weaknesses before they become a serious problem. The relationship between the school and the home is a strong point of Baptist Academy. For this reason, the families come to the school on the recommendation of families who are already in the school.

The spiritual growth of the children is helped by daily Bible classes, prayer times, weekly chapels, guest speakers and the personal life and counsel of the teacher. Children are encouraged to receive Jesus Christ as their personal Saviour.

The students are happy and secure in the school which is characterized by good discipline, accomplished without coercion or tension. Children are taught to respect one another and all those who are in authority.



# SECONDARY SCHOOL

The spirit and high morale reflect a relationship and a friendly atmosphere which exists with both faculty and students.

All teachers meet regularly in the morning to pray for their students and to have fellowship with the Word of God.

A strong traditional academic curriculum with a choice of college preparatory or general program is offered. All candidates for a Baptist Academy High School diploma must have earned 24 credits in grades 9-12. All students must complete four years of Bible, four years of English, three years of social studies, two years of science, and at least one year of math. A complete course description book is available at the high school office for all students enrolling in Baptist Academy.

Student government, social functions, educational trips, music, drama, sports, and class activities are all part of the secondary school life. Qualifying students are elected to the National Honor Society each year.



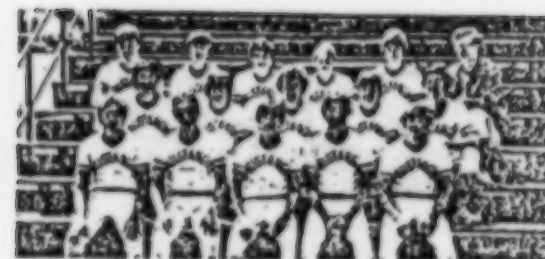




#### MUSIC AND DRAMA

In addition to the required courses, musical activities include Choir, Gospel Team, Girls Chorus, and Senior High and Junior High Band. Numerous opportunities are provided for students to perform. The Gospel Team performs two Sunday evenings a month throughout the second semester. The Choir has also enjoyed a Choir tour each year. Music is accepted as a gift from God, and students are taught to dedicate their talents to Him.

Dramatic expression is fostered through performance at programs, the High School Drama Club, and periodic presentations. As in other arts, the emphasis is upon the recognition of ability as God-given and the proper exercise of that ability.



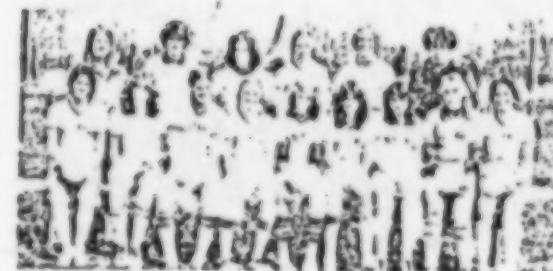
#### SPORTS AND PHYSICAL EDUCATION

The school believes in a good physical education program and in a good interscholastic sports program. Physical education begins in kindergarten and is required through the High School. Students are taught to care for their bodies, that their bodies are a gift from God, and that their bodies are to be dedicated to God. Presently, it is necessary for the High School to lease adequate gymnasiums to accommodate our High School athletic competitions. The elementary schools do have an all purpose room to provide for the physical education activities. Teachers of the boys and girls are trained in elementary and secondary physical education. Whenever possible, it is our desire that all of the coaches of the teams are also members of the faculty.

The school competes interscholastically in the following sports: basketball, baseball, softball, soccer and volleyball.

The interscholastic sports for boys are as follows: soccer, basketball and baseball.

The interscholastic sports for girls are as follows: basketball, softball, volleyball and cheerleading.





Although it is our desire to have a winning team, it is most important that our students gain strong Christian character through the competitive sports. The coaches desire to have a positive spiritual influence on the athletes while teaching them the skills and the strategy of the various sports. Baptist Academy athletes are trained to play their best and to maintain a Christian attitude and testimony during the pressures of competition. This approach to sportsmanship has earned the respect of visiting teams and officials.

Boys and girls have a good and a fair opportunity to make the interscholastic teams because the school is of modest size and all students are afforded an equal opportunity to participate.



#### DISCIPLINE

Without a disciplined atmosphere, Baptist Academy would cease to become a Christian school in the truest sense of the word. It certainly would not be a place where parents would want to send their students for their academic and spiritual training. It will be our goal, therefore, to endeavor to work with parents in helping our students to become responsible and self-disciplined individuals.

#### REQUIREMENTS

Students must have a Bible for daily classroom use. The King James Version is encouraged and promoted especially for Bible memorization. Students must be prepared for classes with books, paper, pencils, etc. Students are required to attend church faithfully each week.

The school requires that children entering kindergarten have a medical examination before enrollment. A form will be furnished to the parent in order that necessary information may be recorded and returned to the school prior to the child's enrollment. Kindergarten must have a dental examination, hearing screening, and proof of proper immunizations. The age limit for kindergarten enrollment is the 5th birthday on or before December 1st of the year the student plans to enroll.

It is the policy of Baptist Academy to admit students from Christian homes who qualify spiritually, socially, and academically for our program.

After an application is submitted, an interview, preferably with both parents and the principal or the administrator will be required. At this time, a \$10 application fee will be requested. For further enrollment information, please call our office at 942-0363.

## CHAPEL

Chapel is held weekly for all grade levels. Student involvement is encouraged and guest speakers are brought in to share on meaningful topics for our high school young people.



## DRESS CODE

Personal appearance reflects on our Lord as well as on the name of Grand Rapids Baptist Academy. Therefore, the school, the staff, administration, and parents must insist upon a personal appearance among the students which reflects our Christian principles. This policy does not merely reflect one person's attitude, but the composite standard that the Academy board wishes for the students and the school.

While attempting to set guidelines for positive personal appearance, we cannot allow the most permissive nor the least permissive parent to set the standard. We have sought to develop a standard of proper dress and general appearance for students which will: (1) Reflect favorably on the whole student body. (2) Not reflect negatively on the Christian nature of our school. (3) Be an acceptable standard in the eyes of most of our parents.

A student's appearance relates directly to his or her personal testimony for Jesus Christ. Therefore, each student is expected to evidence Christian discrimination in this area. (1 Timothy 4:12) Even as there is appropriate clothing for church, baseball, gym, hunting, etc., so too, there is appropriate clothing for school.

## ADMISSIONS INFORMATION

Parents and their students are cordially invited to visit the school during the day to meet students and teachers and to talk to the administrator. This personal contact gives valuable insight and helps the prospective student and his parents to visualize the school in action. Visitation is easily arranged by calling the school office.

Following the investigation of the school, parents may submit the application form with the application fee. Upon receipt of the completed forms, arrangements are made by the office for the administration of an entrance test and a parental interview.

Since the Academy is a board-controlled school and is viewed as an extension of the Christian home, and is also viewed as working in harmony with our evangelical churches, the admissions committee also interviews the parents. It is required that one parent, preferably both, be a Born Again Christian in good standing in a local church. Parents must give evidence that they concur with the school's statement of faith, philosophy of education, and educational goals. Because Baptist Academy is a ministry that seeks to aid parents in fulfilling the scriptural mandate to "train up a child..." we have always been, and will always be scripturally bound to admit all children, regardless of race or ethnic origin.

Application forms are available by contacting the school office. No pressure is exerted upon inquirers to enroll their children. The school is happy to answer any questions, but feels that God leads parents to make the decision about the enrollment of their children.

Early application is recommended to avoid disappointment.





### COST

Please see the attached schedule of tuition and transportation expenses for the current school year.

### TRANSPORTATION

Transportation is provided in the city of Grand Rapids and in some outlying areas. There is a charge for transportation for those who reside outside of city limits of Grand Rapids. For further information please contact the Transportation Supervisor at administration office between the hours of 9:00 a.m. and 3:00 p.m. (Phone 942-0363)



### CHRISTIAN STEWARDSHIP

The Baptist Academy exists to train children and young people to serve God in their generation today, as students, tomorrow as peace-setters and leaders. Tuition charges have been kept as low as possible so that parents of restricted means may be able to enroll their children. Therefore, contributions beyond tuition income are required for our building commitments as well as for our own new building program.

You are invited to share in this strategic Christian ministry with children and young people through the stewardship of your own giving. Contributions may be designated for the operating budget or for the building fund, and are tax deductible to the legal limits. As God provides, the facilities of Baptist Academy are being expanded. You may write to the school for aid in implementing your desire to include in your will the Christian education of generations unborn, if the Lord tarries.

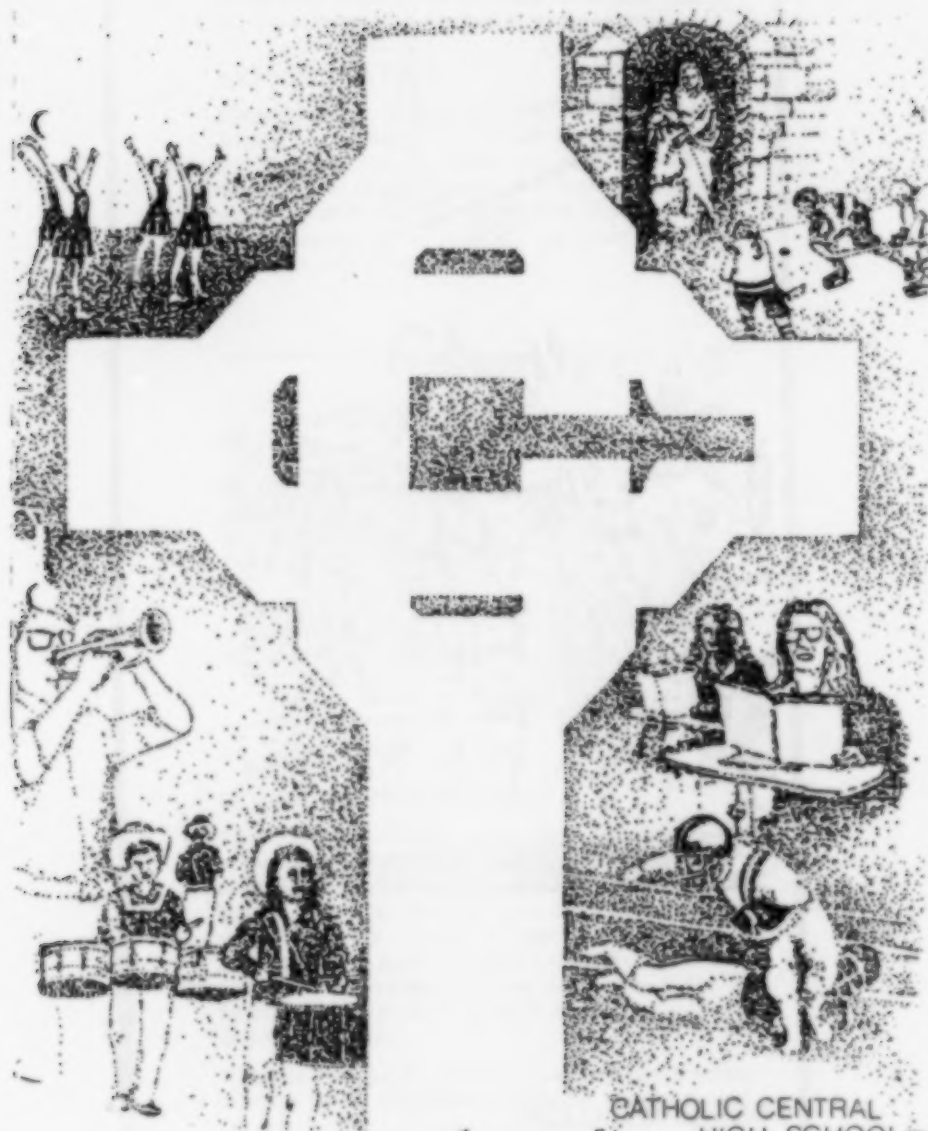


### FOR INFORMATION

Your inquiry is cordially invited. For further information and admissions forms, contact:

Grand Rapids Baptist Academy  
3101 Leonard Street, N.E.  
Grand Rapids, MI 49505  
Phone: (616) 942-0363

PLAINTIFFS' Ex 21



CATHOLIC CENTRAL  
HIGH SCHOOL

CURRICULUM GUIDE 1981-82

MINIMUM REQUIREMENTS FOR GRADUATION

In compliance with the requirements set up by the Accreditation Bureau of the University of Michigan and those of the Catholic Interparochial High School Board, Catholic Central High School requires 20 units of credit for graduation in addition to the satisfactory completion of one unit of Physical Education. One unit is one full year of successful work in a subject. Of the 20 units the following requirements must be met for graduation.

English	4 units	Science	1 unit
Religious Ed	4 units	Social Studies	2 units
Math	2 units		

SCHOOL POLICY ADDITIONS

1. EACH STUDENT MUST CARRY A MINIMUM OF 5 SUBJECTS PER YEAR. It is also mandatory that the 7th and 8th semesters of work be carried at Catholic Central.
2. Courses offered in the morning Community Education program at Catholic Central will not be counted as one of the five required courses which a student must take each day. The administration may grant exceptions to this ruling in the case of students with special needs. Students in grades 9 thru 11 must remain in school through the 7th period of the day even though they may have chosen to begin their school day at 7:45 A.M. Students in grade 12 must remain in school through the 6th period of the day even though they have chosen to begin their school day at 7:45 A.M.
3. Selected courses offered in the Catholic Central program may be taken on a credit/non-credit basis. A course taken on a credit/non-credit basis will not count as one of the student's five academic courses.
4. A student must complete his/her required courses at Catholic Central High School. A "required course" is one designated as such in the Catholic Central Curriculum Guide and must be successfully completed to receive a Catholic Central diploma. A student must take four years of Religion as well as four years of English at Catholic Central High School. Courses taken outside the Catholic Central facility in Night School, Day School, or Summer School will receive full credit and will appear on the student's permanent record as electives, but will not substitute for a required course at Catholic Central. Exceptions may be made in the case of a transfer student.
5. Four years of daily attendance in a Religion class offered at Catholic Central High School is required of all students who attend Catholic Central High School. **EXCEPTION** - Students who can clearly demonstrate that they are active members of an established religion other than Catholic, may make special arrangements with the Principal of Catholic Central High School to receive religious instruction in their own Church. It should be clearly understood that all students attending Catholic Central High School must receive religious instruction on a regular basis, from a qualified instructor, and progress reports must be sent to the Principal of Catholic Central High School on a regular basis.

The enclosed suggested curricula meet these minimum requirements. All of our courses will be considered by institutions of higher learning. Those students who desire specific pre-college training should consult the college catalog and their counselor for detailed planning. Our regular program is four years in duration. The school administrators will determine cases of deviation from the stated program.

RELIGION DEPARTMENT

**MISSION:** To help the students understand and live their faith through a maturing relationship with Christ.

**GOALS:** To present truths of the Catholic Faith.  
A.

- OBJECTIVES:**
1. To use Church documents, such as Basic Teachings for Catholic Religious Education, National Catechetical Directory, To Teach as Jesus Did, etc., as a foundation for curriculum building.
  2. To devote time to a study of the Sacred Scriptures and the Word of God.
  3. To study the life of Jesus so as to come to know him as a person with whom one can enter into a relationship.
  4. To present a fundamental and basic overview of the various doctrinal elements of the Catholic Faith.
  5. To conduct a study of prayer, the various forms of prayer, and its place in the life of a Catholic.
  6. To examine the issues of justice and social awareness and their role in the life and belief of the Christian.

B. To present the values of Christian Living.

- OBJECTIVES:**
1. To incorporate materials into the curriculum which will help the students to reflect on affirming self-concepts.
  2. To incorporate materials into the curriculum which will help the students to develop wholesome Christian interpersonal relationships.
  3. To use different techniques in the classroom which will encourage an atmosphere of respectful candor.
  4. To examine materials which address themselves to the values of all Human Life as promulgated by the Catholic Church.
  5. To examine situations in the world which involve aspects of justice, the market place, and global relationships.
  6. To have the students consider the value of healthy sexuality in their own lives and in the lives of mature Catholics.

C. To provide opportunities for Catholic Liturgical/Worship Services.

- OBJECTIVES:**
1. To have all-school Masses on significant occasions.
  2. To have at least two major Reconciliation Services.
  3. To have students involved in the planning of the Liturgical Services.
  4. To have small group Prayer Services and Liturgies.
  5. To have times available for students to participate in the rite of individual Reconciliation.

D. To help coordinate opportunities for students to engage in acts of Christian Service.

- OBJECTIVES:**
1. To work with the Student Congress on various school projects.
  2. To reach out to the poor and the hungry in our community especially at Thanksgiving and Christmas times.
  3. To work with other departments to conduct at least one ecological or beautification project in the local community each year.
  4. To encourage and advocate student participation in various charitable causes such as the Crop Walk, Walkathon, etc.
  5. To create a bulletin board which will promote and advertise various service programs or service needs.

**COURSE DESCRIPTION:**  
**RELIGION 9**  
111  
1 Cr.

"Your Faith and You" is a synthesis of Catholic Belief. The chapters of the text are as follows: God, Our Father, Jesus, The Trinity and The Holy Spirit, The Catholic Community (Church), The Sacraments, Christian Morality: Living the Christian Life, The Catholic Church in the Modern World, Prayer, Worshipping God: The Eucharist, The Last Things.

**RELIGION 10**  
211  
1 Cr.

These Stones Will Shout is primarily concerned with an in-depth study of the Old Testament. In addition to examining the historical-cultural contexts of Genesis through Maccabees, a companion Bible is used to facilitate both the academic and the spiritual deepening of each student. The text used integrates the students' present day experiences with that of the Chosen People of God.

CHRISTIAN MORALITY develops from the traditional concept that grace builds on nature. It emphasizes that morality is conformity to the truly human thing to do in any situation that calls for a moral decision. The "Jesus principle" of love in action is presented as a practical, motivating force in the moral life of a Christian. The question "What would Christ do on this issue?" is a guiding principle for our lives.

**RELIGION 11**  
311  
1 Cr.

The New Testament. This course is designed to give students a view of the plan and intention of the New Testament Books. Students will learn the life of Christ: the meaning of His Baptism, Desert Temptations, Miracles and Parables. Students will study what the Challenge of Jesus is, how His followers responded to it, and will be invited to be stronger followers of Jesus. Students will focus attention on Jesus' Love, how He prayed, how He suffered and died, and His glorious resurrection. The "Seventh Trumpet" Mark Link S.J.  
Church History. In this course, the Church's role in history is defined as interpreting the timeless meaning of Jesus in each age and in each culture. The course focuses on the mission of the Church as a continuation of the saving mission of Jesus: to lead people toward the fulfillment of God's plan for His creation, a mission which has formed the Church of our day and is forming the Church of the future.



11-11-11  
111  
1 Cr.

Christian Social Justice is a course designed to present the social situation of today in a way that will call forth a Christian response. The economic, political, and cultural aspects of society are presented within the context of the Vision of Jesus. The realities of poverty, slavery, and aesthetic deprivation are studied, emphasizing the Catholic Church's obligation to express justice and work toward it. Holy scripture, the Encyclicals and other Catholic Church documents are used as the basis of our instruction.

Catholic Marriage is a course designed to present the realities of human sexuality and marriage in a way that will call forth a Christian response. Through readings, discussions, and presentations, students have the opportunity to examine the Church's interpretation of human sexuality, to search honestly for the answers to their many questions in an environment that provides guidance and insight. The Catholic marriage is examined in its various aspects: personal relationship, social institution, sacramental covenant. Related topics studied include: personal identity, the ongoing process of maturing, sexuality, Catholic life-style, communication, dating, sexual morality, commitment, child raising, family management. Divorce as seen by the Catholic Church is also examined. "Married in the Lord" Michael P. Friess, S.T.D.

#### COORDINATOR OF RELIGIOUS AFFAIRS

It is widely recognized that Catholic Schools are to be communities of faith in which the Christian message, the experience of worship, community and social concern are integrated in the total experience of students, their parents, and members of the faculty. (National Catechetical Directory)

In fulfilling this directive of our American Bishops it is of primary importance that the School provide a spiritual ministry for the students, their families and the staff. We have a Religious Sister appointed to our administrative staff whose task is to plan, direct and coordinate the religious affairs of the school. This Sister, known as the Coordinator of Religious Affairs, works closely with the administration of the school and the Religion Department to provide a favorable spiritual, psychological and pedagogical environment for the students and staff.

Specific duties of the Coordinator will include:

- 1) leading morning prayer over the public address system
- 2) arranging for visitors to come to the school
  - to celebrate the Sacraments of Eucharist and Reconciliation
  - to speak to student groups/religious classes
  - to provide spiritual counseling
  - to meet with parish youth on site
  - to participate in school activities
- 3) secretary for All-School Prayers
- 4) scheduling individual class Masses
- 5) making available retreat opportunities/days of recollection

- 6) planning Community of Faith Days for staff
- 7) participating in Religion Department meetings
- 8) visiting the hospitalized/homebound
- 9) developing means of fostering religious vocations

We consider the above spiritual ministry of the school of paramount importance to the attainment of the spiritual objectives of Catholic Central High School.

# PLAINTIFFS' Ex 24

## WEST CATHOLIC HIGH SCHOOL

ADDRESS: 1801 Bristol Ave., N.W.

WICKHAM: 1

FALCONS

PHONE: 493-4467

COLORS:

GREEN AND WHITE

PRINCIPAL: Mr. Edward Wagner

ASSISTANT PRINCIPAL: Mr. Richard Cobb-Isak

West Catholic features sound moral and religious values rooted in our Catholic, Christian heritage. Our students are shown a direction and meaning for life during their most critical years. To guide them in these critical years is a carefully screened faculty and administration made up of lay and religious men and women, dedicated to the principles of Catholic education. Several priests from surrounding parishes add a special dimension and variety to serve the sacramental needs of our school community.

West Catholic features a sound academic program which enables students to attend the college or pursue the career of their choice. The standards are high and the curriculum is broad. Besides the standard college prep curriculum students may select college credit courses in English, History or political studies in the West Catholic facility. Also available in the West Catholic facility are Home Economics, nursery school training, woodworking, arts and crafts, architectural drawing, ceramics, leadership training and theater arts. For students interested in vocational courses, there are the Skills Centers, Educational Park and Incentive to Learn.

West Catholic features a complete program of athletics and activities for girls and boys. We offer ten varsity sports for boys and nine varsity sports for girls. Even though our history is short, our tradition is rich and our excellence is known throughout the state. The variety allows everyone interested in athletics to participate regardless of physical stature.

A strong vocal and instrumental music program is available for the musically inclined. Music as an art form fosters self-expression and contributes to the development of the whole person.

We encourage students to participate in meaningful activities outside the school. The past few years West Catholic students have led all other schools in awards and leadership positions in the Junior Achievement program.

West Catholic features a strong philosophy of discipline. Our students are expected to attend all day, every day, prepared to study. Education is important, Christian respect for one another is important. Discipline develops this respect so that a few cannot prevent the majority from getting what is rightfully theirs - an education.

What do you want your child to learn at school?

Young people learn more in their classroom than is contained in a textbook. Facts and figures may be forgotten, but lessons in living - good and bad - remain.

Every year hundreds of young Catholics and their families turn to West Catholic for an atmosphere that encourages EXCELLENCE, INVOLVEMENT AND SPIRITUAL GROWTH AS A WAY OF LIFE.

# PLAINTIFFS' Ex 28

## SERVICES PROVIDED FOR NON-PUBLIC SCHOOLS

Since 1970, the Grand Rapids Public Schools and non-public schools in the community have developed a new spirit of cooperation to provide additional educational services for the benefit of all children. The following compares the number of students this year to the number served during the 1970/71 school year.

	NUMBER OF STUDENTS SERVED	
	1970/71	1978/79
Transportation	-	5,519 (1980)
Drownproofing	-	820
Shared Time Classes (Phys. Ed., Art, Reading, Math, etc..)	194	12,479
Driver Education	-	899
Educational Park	42	244
Kent Skills Centers	-	198
Community Education & Adult Education	-	11,952
Compensatory Education	456	575
Psychological Services	229	194
Social Work	189	272
Speech Pathology	456	306 (1980)
TOTAL	1,566	33,461

## Additional Services for Non-Public Schools

The Grand Rapids Public Schools also provided non-public schools with the following additional services which affect many more non-public students.

### Athletics Services

Non-public schools use Grand Rapids Public School's athletic facilities, such as Houseman Field & two high school swimming pools, free of charge.

### Audio Visual

The film library of the Grand Rapids Public Schools is available to non-public schools as well as to private colleges in the area. Over 3,000 film bookings were placed for non-public schools in the school year 1978/79. In addition to the film library, other audio services and equipment are also available through the district's Instructional Media Center.

### Cabletelevision

Since 1976 the public and non-public schools have cooperated in their involvement with cabletelevision activities. All schools in Grand Rapids, kindergarten through 12th grade use Channel E, the second channel designed for educational purposes. In addition, representatives from all schools meet regularly to discuss school wiring, programming and other concerns related to the effective use of cable in the schools.

#### Cooperative Purchasing

Most non-public schools buy their school and maintenance supplies through the public school purchasing office at the public school cost. This quantitative buying saves all systems a great amount of money.

#### Mail Delivery

The Grand Rapids Public School system delivers inter-office mail to non-public schools which house community education programs. During the 1979/80 school year, mail is being delivered to forty-seven (47) non-public schools a minimum of twice a week either directly or to the nearest public school building.

#### Paperback Books

Since the adoption of legislation of 1974, \$17,400 has been allocated to non-public schools for the purchase of paperback books.

#### Reading Consultation

Seventeen (17) reading consultants are currently assigned one-half (1/2) day per week to each of twenty-two (22) non-public elementary schools. These consultants are available to work in the classroom with students and to assist teachers, both individually and in group in-service on request. Eight (8) non-public schools have a reading teacher to work with students 2 1/2 days per week.

The following non-public schools currently receive one or more of the above services provided by the Grand Rapids Public Schools.

#### SECONDARY SCHOOLS

Baptist Academy  
Catholic Central  
Grand Rapids Christian  
St. Joseph Seminary

Sylvan Junior High  
Villa Maria  
West Catholic

#### ELEMENTARY SCHOOLS

Adams St. Protestant Reformed  
Baptist Academy Crestview Elementary  
Blessed Sacrament  
Climbing Tree  
Creston Christian  
Holy Name  
Holy Spirit  
Holy Trinity  
Immaculate Heart of Mary  
Immanuel-St. James Lutheran  
Martin Luther  
Marywood Academy  
Millbrook Christian  
Oakdale Christian  
Plymouth Christian  
Sacred Heart  
St. Adalbert

St. Alphonsus  
St. Andrew  
St. Anthony  
St. Francis Xavier  
St. Isidore  
St. James  
St. Jude  
St. Mary  
St. Paul the Apostle  
SS Peter and Paul  
St. Stephen  
St. Thomas  
Seventh-Day Adventist  
Seymour Christian  
Sylvan Christian  
Westside Christian

## PLAINTIFFS' Ex 31

Text approved by the National Conference of Catholic Bishops at their General Meeting,  
November 14-17, 1977.

Approved by the Sacred Congregation for the Clergy, Second Office, October 30, 1978.



# Documents of Vatican II

## DOCUMENTS OF VATICAN II

Bishops:	<i>Decree on the Bishops' Pastoral Office in the Church (Christus Dominus)</i>
Christian Education:	<i>Declaration on Christian Education (Christusnam Educationis)</i>
Church:	<i>Dignitate Constitution on the Church (Lumen Gentium)</i>
Eastern Churches:	<i>Decree on Eastern Catholic Churches (Orientalium Ecclesiarum)</i>
Ecumenism:	<i>Decree on Ecumenism (Unitatis Redintegratio)</i>
Liturgy:	<i>Decree on the Apostolate of the Laity (Apostolicum Laicatum)</i>
Missionary Activity:	<i>Decree on the Church's Missionary Activity (Ad Gentes)</i>
Modern World:	<i>Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)</i>
Non-Christian Religions:	<i>Declaration on the Relationship of the Church to Non-Christian Religions (Nostra Aetate)</i>
Priestly Formation:	<i>Decree on Priestly Formation (Optatum Totius)</i>
Presbyters:	<i>Decree on the Ministry and Life of Priests (Presbyterorum Ordinem)</i>
Religious Freedom:	<i>Declaration on Religious Freedom (Dignitatis Humanae)</i>
Religious Life:	<i>Decree on the Appropriate Renewal of the Religious Life (Perfectae Caritatis)</i>
Revelation:	<i>Dogmatic Constitution on Divine Revelation (Dei Verbum)</i>
Sacred Liturgy:	<i>Constitution on the Sacred Liturgy (Sacrosanctum Concilium)</i>
Social Communication:	<i>Decree on the Instruments of Social Communication (Inter Mirificas)</i>

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## OTHER CHURCH DOCUMENTS

	<i>A Call to Action</i> (Paul VI, 1971): <i>A Call to Action</i> , Apostolic Letter on the Occasion of the Eighteenth Anniversary of the Encyclical <i>Rerum Novarum</i> , May 14, 1971.
BT:	<i>Basic Teachings for Catholic Religious Education</i> . Prepared by the National Conference of Catholic Bishops in consultation with the Holy See, January 1973.
GC13:	<i>General Catechetical Directory</i> . Prepared by the Sacred Congregation for the Clergy and approved by Pope Paul VI on March 10, 1973. © Copyright 1973 by the United States Catholic Conference. All rights reserved.
JW:	<i>Justice in the World</i> . Prepared by the Second General Assembly of the Synod of Bishops and confirmed by Pope Paul VI on November 30, 1973.
	<i>On Evangelization</i> (Paul VI, 1975): <i>On Evangelization in the Modern World (Evangelii Nuntiandi)</i> , an Apostolic Exhortation of Pope Paul VI, December 8, 1975.
	<i>Partis de la Church</i> (Paul VI, 1964): <i>Partis de la Church (Evangelium Nuntiandi)</i> , Encyclical Letter of Pope Paul VI, August 6, 1964.
	<i>Pater on Faith</i> (John XXIII, 1963): <i>Pater on Faith (Pater in Fide)</i> , Encyclical Letter of Pope John XXIII, April 11, 1963.
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- The Religion of Children* (1976): Nelson, Hart M., Pevin, Raymond H., Shields, Joseph, *The Religion of Children*. Publications Office, United States Catholic Conference, 1976.

and manifest itself." However, programs for preschool children themselves are also desirable, in accordance with the guidance given in article 177.

## 231. Special catechesis

Catechetical programs for people with mental, emotional, or physical handicaps should be provided on the parochial, regional, or diocesan level. Each handicap requires its own approach, and separate programs are therefore required for each category of handicapped persons. Those involved in special catechetical programs should receive the training needed to perform their particular duties.

The parish community should be informed about the needs of its handicapped members and encouraged to support them with love and concern. The faith witness of handicapped persons can be a model and stimulus to growth in faith on the part of parishioners generally.

The families of the handicapped also need care and concern, including assistance directed to helping them participate with competence and confidence in the catechesis of their handicapped members.

## 232. Catholic schools

Catholic schools are unique expressions of the Church's effort to achieve the purposes of Catholic education among the young. They "are the most effective means available to the Church for the education of children and young people."

Catholic schools may be part of the parish structure, interparochial or regional, diocesan or private. Growth in faith is central to their purpose.

As a community and an institution, the school necessarily has an independent life of its own. But a parochial school is also a community within the wider community, contributing to the parish upon which it depends and integrated into its life. Integration and interdependence are major matters of parish concern; each program in a total catechetical effort should complement the others.

Similarly, regional, diocesan, and private schools should work in close collaboration with neighboring parishes. The experience of community in the schools can benefit and be benefited by the parishes.

Teachers in Catholic schools are expected to accept and live the Christian message and to strive to instill a Christian spirit in their students. As catechists, they will meet standards equivalent to those set for other disciplines and possess the qualities described in Chapter IX, Part A.

The school should have a set religion curriculum, with established goals and objectives, open to review and evaluation by parish boards and diocesan supervisory teams. It is recommended that an integrated curriculum provide options for catechists and students by offering electives along with the core curriculum.

It is desirable that Catholic high schools in a diocese work together to share resources, provide opportunities for teacher training and development, and cooperate in establishing program guidelines.

The school's principal and faculty are responsible for making clear the importance of religion. The quality of the catechetical experience in the school and the importance attached to religious instruction, including the amount of time spent on it, can influence students to perceive religion as either highly important or of little importance.

Its nature as a Christian educational community, the scope of its teaching, and the effort to integrate all learning with faith distinguish the Catholic school



from other forms of the Church's educational ministry to youth and give it special impact. In Catholic schools children and young people "can experience learning and living fully integrated in the light of faith,"<sup>9</sup> because such schools strive "to relate all human culture eventually to the news of salvation, so that the life of faith will illumine the knowledge which students gradually gain of the world, of life and of mankind."<sup>10</sup> Cooperative teaching which cuts across the lines of particular disciplines, interdisciplinary curricula, team teaching, and the like help to foster these goals of Catholic education.

"Building and living community must be prime, explicit goals of the contemporary Catholic school."<sup>11</sup> Principal and faculty members have a responsibility to help foster community among themselves and the students. Creative paratiturgies and sacramental celebrations for particular age groups can strengthen the faith community within the school.

Catholic school students should be introduced gradually to the idea and practice of Christian service. In early years, efforts to instill a sense of mission and concern for others help lay a foundation for later service projects, as does study of the lives of the saints and outstanding contemporaries.

Junior and senior high school programs should foster a social conscience sensitive to the needs of all. Familiarity with the Church's social encyclicals and its teaching on respect for human life will be part of this formation. (CJ, Chapter VII) Opportunities for field and community experiences are highly desirable. Teachers, administrators, parents, and students should be involved in planning service projects. One measure of a school's success is its ability to foster a sense of vocation, of eagerness to live out the basic baptismal commitment to service, whether this is done as a lay person, religious, deacon, or priest.

Catechesis speaks of the missionary nature of the Church. It points out that all Christians are responsible for missionary activity by reason of the love of God, which prompts in them a desire to share with everyone the spiritual goods of this life and the life to come. Catholic schools provide opportunities for participation in missionary projects through the Holy Childhood Association, the Society for the Propagation of the Faith, etc. They also provide students with opportunities to search for the gifts that the Holy Spirit offers them for this ministry.

Through a carefully planned process, the entire school community — parents, students, faculty, administrators, pastors, and others — needs to be involved in the development of its goals, philosophy, and programs.

### 233. Catholic schools and the disadvantaged

The Second Vatican Council urged bishops and all Catholics to "spare no sacrifice" in helping Catholic schools to fulfill their functions more perfectly, and especially to care for "the needs of those who are poor in the goods of this world or who are deprived of the assistance and affection of a family or who are strangers to the gift of faith."<sup>12</sup>

In many places in the United States the Church has responded with an extremely large human and economic investment in schools whose pupils are for the most part disadvantaged children in the poverty areas of large cities. An increasing number of parents in poverty areas are making heavy personal sacrifices to send their children to Catholic schools, convinced that the education provided there affords a realistic and hopeful opportunity for breaking out of "the hellish cycle of poverty"<sup>13</sup> and moving into the social and economic mainstream. These schools serve a critical human and social need, while also providing a complete education which includes catechesis and guidance. In



Michael Hirsch

urban areas the Catholic school has a special role of giving witness and fostering evangelization.

### 234. Religion and public education

In a series of decisions concerning prayer and Bible reading during the 1960s, the United States Supreme Court in effect excluded specific efforts to inculcate religious values from the public schools.<sup>14</sup>

Efforts have been made to fill the vacuum created by these decisions by introducing into public schools courses and programs which in one way or another bear upon religion and values. The objective study of religion, whatever form it takes, seeks to convey information about religion or to foster appreciation of its nonreligious contributions, but not to advocate religious belief and values; while courses in sex education, psychology, and sociology, along with "sensitivity" and value clarification programs, deal directly with values.

Many believe it is not possible to produce neutral textbooks on religion and values, much less to teach in a truly neutral way about such matters. Some ask whether "neutrality" about religion and values is appropriate, even supposing it were possible. Many, particularly parents and Church leaders, believe so-called neutrality of this kind weakens young people's religious and moral beliefs and leads to relativism and indifference.

In order to remedy the situation, parents and community leaders, including representatives of churches and synagogues, should become involved in the planning, development, implementation, and evaluation of courses and programs dealing with religion and values. Issues of a highly controversial nature should be treated with extreme sensitivity. Teachers and administrators should be conscious of their responsibility to deal respectfully with pupils from diverse backgrounds and value systems, and should be adequately trained to do so. When young people or their parents object to a program on religious or moral grounds, the public schools should exempt such pupils from participation without embarrassing them.

It is important that parish planners be aware of such courses and programs in public schools and be prepared to address the issues and questions they raise in parish catechetical programs.

### 235. Released time

The laws of some states provide for releasing students from public school during regular school hours so that they can attend catechetical programs off the school premises.<sup>15</sup>

Some states make an hour or more available each week for catechetical instruction. Others provide for "staggered" time, releasing students on an individual or group basis at different hours and days throughout the week. While a number of places have reported good success with these forms of released time, others have complained that scheduling and transportation present serious practical difficulties; they have also noted the bad effect of compartmentalizing religion and relegating catechesis to a small and inadequate portion of the child's or youth's total school time.

More satisfactory results have been reported in a few places which make available a block of time for catechesis — several hours, a whole day, or even several consecutive days.

Good results have been achieved in both released time programs and after-school catechesis by catechetical centers established adjacent to public schools.



Michael Hirsch



Lois Barrett

# PLAINTIFFS' Ex 32

## Declaration on Christian Education

PAUL, BISHOP

SERVANT OF THE SERVANTS OF GOD

TOGETHER WITH THE FATHERS OF THE SACRED COUNCIL

FOR EVERLASTING MEMORY

### INTRODUCTION

This sacred Ecumenical Synod has carefully considered the paramount importance of education in the life of man, and its ever-mounting influence on the social progress of this age.<sup>1</sup> In fact, the education of the young and even a measure of continued instruction for adults have grown both easier and more urgent in the circumstances of our times. For as men grow more conscious of their dignity and calling, they prefer to take an increasingly active part in the life of society, espe-

1. Among many documents illustrating the importance of education, see especially:

Benedict XV, apostolic letter "Communes Litterae," Apr. 10, 1919: AAS 11 (1919), p. 172.

Pius XI, encyclical letter "Divini Illius Magistri," Dec. 31, 1929: AAS 22 (1930), pp. 49-86.

Pius XII, allocution to the youths of Italian Catholic Action, Apr. 20, 1946: "Discorsi e Radiomessaggi," Vol. 8, pp. 53-57.

Pius XII, allocution to fathers of Families of France, Sept. 18, 1951: "Discorsi e Radiomessaggi," Vol. 11, pp. 241-245.

John XXIII, message on the 50th anniversary of the publication of the encyclical letter "Divini Illius Magistri," Dec. 30, 1959: AAS 52 (1960), pp. 57-59.

Paul VI, allocution to members of Federated Institutes Dependent on Ecclesiastical Authority, Dec. 30, 1963: "Encicliche e Discorsi di S.S. Paolo VI," Vol. 1, Rome 1964, pp. 601-603.

In addition, there may be consulted "Acta et Documenta Concilii Oecumenici Vaticani II apparanda," series I, "Antepreparatoria," Vol. III, pp. 363-364, 370-371, 373, 374.

cially in economic and political matters.<sup>2</sup> Enjoying more leisure, as they sometimes do, men find that remarkable developments in technology and in scientific investigation, and new means of social communication offer them readier opportunities for attaining their inheritance of intellectual and spiritual culture, and for fulfilling themselves and one another by forging stronger bonds between various groups and even whole peoples.

As a result, ever-increasing efforts are being everywhere expended to promote the work of education. The primary rights of men with respect to education, especially those of children and of parents, are being emphasized, and are finding expression in public documents.<sup>3</sup> On every side, as the number of pupils rapidly increases, schools are being multiplied and perfected, and other educational institutions are being established. Techniques of education and training are being refined on the basis of new experiments. Strenuous efforts are being made so that all men can obtain an education, though, admittedly, vast numbers of children and young people are still being deprived of even rudimentary training, and many others lack the suitable kind of education in which truth and love are simultaneously inculcated.

In fulfilling the mandate she has received from her divine Founder to proclaim the mystery of salvation to all men, and to restore all things in Christ, Holy Mother the Church must be concerned with the whole of man's life,<sup>4</sup> even the earthly part of it insofar as that has a bearing on his heavenly calling.<sup>5</sup> Therefore she has her role to play in the progress and

2. Cf. John XXIII, encyclical letter "Mater et Magistra," May 15, 1961: AAS 53 (1961), pp. 413, 415-417, 424.

Also his encyclical letter "Pacem in Terris," Apr. 1, 1963: AAS 55 (1963), pp. 270 ff.

3. Cf. the universal profession of the rights of man ("Déclaration des droits de l'homme") of Dec. 10, 1948, adopted by the General Assembly of the United Nations; see also "Déclaration des droits de l'enfant" of Nov. 20, 1959; also "Protocole additionnel à la convention de sauvegarde des droits de l'homme et des libertés fondamentales," Paris, Mar. 20, 1952; regarding that universal profession of the rights of man mentioned above, cf. John XXIII, encyclical letter "Pacem in Terris," Apr. 11, 1963: AAS 55 (1963), pp. 293 ff.

4. The Council here states its basic position with regard to the Declaration on Christian Education. Although the Church is concerned primarily with the spiritual and supernatural destiny of man, it recognizes the intimate connection between that destiny and "the whole of man's life." See introductory notes.

5. Cf. John XXIII, encyclical letter "Mater et Magistra," May 15, 1961: AAS 53 (1961), p. 402.

See also Second Vatican Council's Dogmatic Constitution on the Church,



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spread of education. Hence this sacred Synod enunciates certain basic principles of Christian education, especially those applicable to formal schooling. These principles will have to be developed at greater length by a special postconciliar Commission and applied by episcopal conferences to varying local situations.

1. Since every man of whatever race, condition, and age is endowed with the dignity of a person, he has an inalienable right to an education<sup>6</sup> corresponding to his proper destiny<sup>7</sup> and suited to his native talents, his sex, his cultural background, and his ancestral heritage. At the same time, this education should pave the way to brotherly association with other peoples, so that genuine unity and peace on earth may be promoted. For a true education aims at the formation of the human person with respect to his ultimate goal, and simultaneously with respect to the good of those societies of which, as a man, he is a member, and in whose responsibilities, as an adult, he will share.

As a consequence, with the help of advances in psychology and in the art and science of teaching, children and young people should be assisted in the harmonious development of their physical, moral, and intellectual endowments. Surmounting hardships with a gallant and steady heart, they should be helped to acquire gradually a more mature sense of responsibility toward ennobling their own lives through constant effort, and toward pursuing authentic freedom. As they advance in years, they should be given positive and prudent sexual education. Moreover, they should be trained to take their part in social life, so that by proper instruction in necessary and useful skills they can become actively involved in various community organizations, be ready for dialogue with others, and be willing to act energetically on behalf of the common good.

This holy Synod likewise affirms that children and young people have a right to be encouraged to weigh moral values with an upright conscience, and to embrace them by personal

Art. 17: AAS 57 (1965), p. 21; also the scheme of the Pastoral Constitution on the Church in the Modern World (1965), *passim*.

6. Pius XII, radio message of Dec. 24, 1942: AAS 35 (1943), pp. 12, 19. John XXIII, encyclical letter "Pacem in Terris," Apr. 11, 1963: AAS 55 (1963), pp. 239 ff. See also the declarations of the rights of man cited in note (3).

7. Cf. Pius XI, encyclical letter "Divini Illius Magistri," Dec. 31, 1929: AAS 22 (1930), pp. 50 ff.

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choice, and to know and love God more adequately.<sup>8</sup> Hence, it earnestly entreats all who exercise government over peoples or preside over the work of education to see that youth is never deprived of this sacred right. It urges sons of the Church to devote themselves generously to the whole enterprise of education, with the special aim of helping to bring more speedily to all men everywhere the worthy benefits of education and training.<sup>9</sup>

2. Since every Christian has become a new creature<sup>10</sup> by rebirth from water and the Holy Spirit, so that he may be called what he truly is, a child of God, he is entitled to a Christian education. Such an education does not merely strive to foster in the human person the maturity already described. Rather, its principal aims are these:<sup>11</sup> that as the baptized person is gradually introduced into a knowledge of the mystery of salvation, he may daily grow more conscious of the gift of faith which he has received; that he may learn to adore God the Father in spirit and in truth (cf. Jn. 4:23), especially through liturgical worship; that he may be trained to conduct his personal life in righteousness and in the sanctity of truth, according to his new standard of manhood (Eph. 4:22-24).

Thus, indeed, he may grow into manhood according to the mature measure of Christ (cf. Eph. 4:13), and devote himself to the upbuilding of the Mystical Body. Moreover, aware of his calling, he should grow accustomed to giving witness to the hope that is in him (1 Pet. 3:15), and to promoting that Christian transformation of the world by which natural values, viewed in the full perspective of humanity as redeemed by Christ, may contribute to the good of society as a whole.<sup>12</sup>

8. The theme of personal responsibility which has dominated so many of the deliberations of Vatican II comes out very clearly here. Note the insistence on children and young people and their own development in contradistinction to a previous attitude of education as if it were imposed from above. There is an interesting connection between this paragraph and the Declaration on Religious Freedom.

9. Cf. John XXIII, encyclical letter "Mater et Magistra," May 15, 1961: AAS 53 (1961), pp. 441 ff.

10. Cf. Pius XI, encyclical letter "Divini Illius Magistri," loc. cit., p. 81.

11. Here is the most positive statement of the true essence of Christian education. The Christian view of life is simply different and is based on a belief in a supernatural life. The result is that the Christian can never be satisfied with mere material-minded education. It also explains why Christian education is not merely ordinary education with an added dose of religious knowledge.

12. Cf. Second Vatican Council, Dogmatic Constitution on the Church, Art. 26: AAS 57 (1965), pp. 61 ff.

Therefore this holy Synod reminds pastors of souls of their acutely serious duty to make every effort to see that all the faithful enjoy a Christian education of this sort, especially young people, who are the hope of the Church.<sup>15</sup>

3. Since parents have conferred life on their children, they have a most solemn obligation to educate their offspring. Hence, parents must be acknowledged as the first and foremost educators of their children.<sup>16</sup> Their role as educators is so decisive that scarcely anything can compensate for their failure in it. For it devolves on parents to create a family atmosphere so animated with love and reverence for God and men that a well-rounded personal and social development will be fostered among the children.<sup>17</sup> Hence, the family is the first school of those social virtues which every society needs.

It is particularly in the Christian family, enriched by the grace and the office of the sacrament of matrimony, that from their earliest years children should be taught, according to the faith received in baptism, to have a knowledge of God, to worship Him, and to love their neighbor. Here, too, they gain their first experience of wholesome human companionship and of the Church. Finally, it is through the family that they are gradually introduced into civic partnership with their fellow men, and into the People of God. Let parents, then, clearly recognize how vital a truly Christian family is for the life and development of God's own people.<sup>18</sup>

While belonging primarily to the family, the task of imparting education requires the help of society as a whole. In addition, therefore, to the rights of parents and of others to whom parents entrust a share in the work of education, certain rights and duties belong to civil society.<sup>19</sup> For this society

15. Cf. Second Vatican Council, *schema of the Decree on the Apostolate of the Laity* (1963), Art. 12.

16. Cf. Pius XI, encyclical letter "Divini Illius Magistri," loc. cit., pp. 39 §: also encyclical letter "Mit brennender Sorge," Mar. 14, 1937: AAS 29 (1937), pp. 164 §.

17. Pius XII, allocution to the first national congress of the Italian Association of Catholic Teachers, Sept. 8, 1946: "Discorsi e Radiomessaggi," Vol. 8, p. 218.

18. The rights of parents are set out very much as they were in the encyclical of Pope Pius XI on Catholic education. However, attention should be drawn here to the spiritual and psychological role of parents. It is a development of the concept that the prime educative force in society is the family.

19. Cf. Second Vatican Council, *Decree on the Church's Constitution*, Art. 17 and 18: AAS 37 (1965), pp. 16 and 46 §.

20. The Declaration limits the powers of the state rather sharply in this paragraph. Note the unusual application of the principle of subsidiarity.

exists to arrange for the temporal necessities of the common good. Part of its duty is to promote the education of the young in several ways: namely, by overseeing the duties and rights of parents and of others who have a role in education, and by providing them with assistance; by implementing the principle of subsidiarity\* and completing the task of education, with attention to parental wishes, whenever the efforts of parents and of other groups are insufficient; and, moreover, by building its own schools and institutes, as the common good may demand.<sup>20</sup>

Finally, the office of educating belongs by a unique title to the Church, not merely because she deserves recognition as a human society capable of educating, but most of all because she has the responsibility of announcing the way of salvation to all men, of communicating the life of Christ to those who believe, and of assisting them with ceaseless concern so that they may grow into the fullness of that same life.<sup>21</sup> As a mother, the Church is bound to give these children of hers the kind of education through which their entire lives can be penetrated with the spirit of Christ, while at the same time she offers her services to all peoples by way of promoting the full development of the human person, for the welfare of earthly society and the building of a world fashioned more humanly.<sup>22</sup>

4. In discharging her educative function, the Church is preoccupied with all appropriate means to that end. But she is particularly concerned with the means which are proper to herself.

\*For the principle of subsidiarity, cf. footnote on Art. 66, Pastoral Constitution on the Church in the Modern World.—Ed.

18. Cf. Pius XI, encyclical letter "Divini Illius Magistri," loc. cit., pp. 61 §.

19. Pius XII, radio message of June 1, 1941: AAS 33 (1941), p. 200; allocution to the first national congress of the Italian Association of Catholic Teachers, Sept. 8, 1946: "Discorsi e Radiomessaggi," Vol. 8, p. 218.

Regarding the principle of subsidiarity, cf. John XXIII, encyclical letter "Pacem in Terra," Apr. 11, 1963: AAS 64 (1963), p. 294.

20. Cf. Pius XI, encyclical letter "Divini Illius Magistri," loc. cit., pp. 31 §.

21. Also his encyclical letter "Non abbiamo bisogno," June 29, 1931: AAS 23 (1931), pp. 311 §.

22. Pius XII, letter of the Secretariate of State to the 28th Italian Social Week, Sept. 20, 1955: "L'Osservatore Romano," Sept. 20, 1955.

23. The Church praises those local, national, and international civil authorities who, conscious of the more pressing necessities of these times, expend all their energy so that all people may share a fuller education and human culture. Cf. Paul VI's allocution to the General Assembly of the United Nations, Oct. 4, 1963: "L'Osservatore Romano," Oct. 6, 1963.

# TO TEACH AS JESUS DID

## A Pastoral Message on Catholic Education

### NATIONAL CONFERENCE OF CATHOLIC BISHOPS

November, 1972

1973  
Publications Office  
UNITED STATES CATHOLIC CONFERENCE  
1312 Massachusetts Avenue, N.W.  
Washington, D.C. 20005

"tasks and responsibilities" of catechesis, "it is not enough to rest content with the distribution of forces already existing: it is also necessary that effort on the part of all Christians be more and more stimulated and promoted. Care must be taken to make the Christian community every day conscious of its duty." (General Catechetical Directory, 107) A comprehensive vision of the Christian ministry in education, and integrated structures to embody it, seem now to offer the best hope for achieving the greatest success with the largest number of Catholic children and young people, both those who attend Catholic schools and those who do not.

#### CATHOLIC SCHOOLS

101 Of the educational programs available to the Catholic community, Catholic schools afford the fullest and best opportunity to realize the threefold purpose of Christian education among children and young people. Schools naturally enjoy educational advantages which other programs either cannot offer or can offer only with great difficulty. A school has a greater claim on the time and loyalty of the student and his family. It makes more accessible to students participation in the liturgy and the sacraments, which are powerful forces for the development of personal sanctity and for the building of community. It provides a more favorable pedagogical and psychological environment for teaching Christian faith. With the Second Vatican Council we affirm our conviction that the Catholic school "retains its immense importance in the circumstances of our times" and we recall the duty of Catholic parents "to entrust their children to Catholic schools, when and where this is possible, to support such schools to the extent of their ability, and to work along with them for the welfare of their children." (Christian Education, 3)

#### Doctrine, Community, Service

102 Christian education is intended to "make men's faith become living, conscious, and active, through the light of instruction." (The Bishops' Office in the Church, 14) The Catholic school is the unique setting within which this ideal can be realized in the lives of Catholic children and young people.

103 Only in such a school can they experience learning and living fully integrated in the light of faith. The Catholic school "strives to relate all human culture eventually to the news of salvation, so that the life of faith will illumine the knowledge which students gradually gain of the world, of life, and of mankind." (Christian Education, 8) Here, therefore, students are instructed in human knowledge and skills, valued indeed for their own worth but seen simultaneously as deriving their most profound significance from God's plan for His creation. Here, too, instruction in religious truth and values is an integral part of the school program. It is not one more subject alongside the rest, but instead it is perceived and functions as the underlying reality in which the student's experiences of learning and living achieve their coherence and their deepest meaning.

104 This integration of religious truth and values with the rest of life is brought about in the Catholic school: not only by its unique curriculum but, more important, by the presence of teachers who express an integrated approach to learning and living in their private and professional lives. It is further reinforced by free interaction among the students themselves within their own community of youth.

105 This integration of religious truth and values with life distinguishes the Catholic school from other schools. This is a matter of crucial importance today in view of contemporary trends and pressures to compartmentalize life and learning and to isolate the religious dimension of existence from other areas of human life. A Catholic is, whom religious commitment is the central, integrative reality of his life will find in the Catholic school a perception and valuation of the role of religion which matches his own.

106 More than any other program of education sponsored by the Church, the Catholic school has the opportunity and obligation to be unique, contemporary, and oriented to Christian service: unique because it is distinguished by its commitment to the threefold purpose of Christian education and by its total design and operation which foster the integration of religion with the rest of learning and living, contemporary because it enables students to address with Christian insight the multiple problems which face individuals and society today; oriented to Christian



## PLAINTIFFS' Ex 34

1981-82

### STATISTICAL BREAKDOWN OF STUDENTS PRESENTLY ENROLLED IN CATHOLIC CENTRAL HIGH SCHOOL ACCORDING TO RACE

<u>White</u>		<u>Black</u>	
Catholic	843	Baptist	18
Assembly of God	1	Catholic	14
Orthodox	1	Protestant	1
Baptist	1	Methodist	3
		Christian	1
		Bethel Pentecostal	2
		Jehovah Witness	2
		Presbyterian	1
 <u>Indian</u>		 <u>Asian</u>	
Catholic	8	Catholic	6
 <u>Hispanic</u>			
Catholic	15		
Episcopalian	1		

## PLAINTIFFS' Ex 35

1981-82  
STATISTICAL BREAKDOWN OF ASSISTANT PRINCIPALS AND TEACHERS AT CATHOLIC CENTRAL HIGH SCHOOL ACCORDING TO RELIGION

Miss Joan Bagrowski	Catholic
Miss Kim Baird	Non-Denominational
Mrs. Barbara Braybrook	Catholic
Mr. Anthony Guizarulla	Catholic
Mr. Kevin Casey	Catholic
Mrs. Olive Clark	Catholic
Mrs. Linda Conway	Catholic
Mr. Gary Dickerson	Methodist
Mr. Brian Dillon	Catholic
Mr. John Dolce	Catholic
Mrs. Helen Emerson	Catholic
Mr. Roy Emerson	Catholic
Mr. James Engemann	Catholic
Sister Robert Ann Erno	Catholic
Mr. Dennis Flak	Catholic
Mr. James Gardiner	Catholic
Mr. Joseph Godlewski	Catholic
Mr. David Honey - Adm. Assistant	Catholic
Sister Katrina Hartman	Catholic
Mrs. Judith Hilla	Unity Christian
Mr. Fred Jamroz	Catholic
Mr. Leon Janowski	Catholic
Mrs. Lois Jones	Episcopalian
Sister Peter Verona Rolenda	Catholic
Mr. Jerome Kronselauski	Catholic
Mr. Charles Lane	Catholic
Mr. John Longo	Catholic
Mr. Donald Lynch	Catholic
Mr. Raymond McCahill - Asst. Principal	Catholic
Sister Irene Mary McDonnell	Catholic
Miss Connie Rietberg	Reformed
Mr. Ralph Shefferly	Catholic
Mr. Eugene Skaszinski	Catholic
Mr. Jules Sommer	Catholic
Mrs. Nanette Swanson	Catholic
Sister Elegia Tim	Catholic
Mrs. Debra Thornton	Catholic
Mr. Clayton Valle	Catholic
Mrs. Sandra Veebit	Catholic
Mr. John Veebit	Catholic
Mrs. Mary Wambolt	Catholic
Mrs. Kathryn Walsh	Catholic
Sister Verona Wangles	Catholic
Mr. Larry Ward	Catholic
Miss Wendolyn Willison	Catholic
Mr. James Wisniewski	Catholic

## PLAINTIFFS' Ex 45

### BYLAWS OF THE BOARD OF DIRECTORS OF THE CATHOLIC INTER-ARCHDIOCESEAL HIGH SCHOOL ASSOCIATION

(revised 10/24/75 and 1/10/77)

#### ARTICLE I

##### Purpose

The purposes for which this Association was formed are set forth in Article I of the Articles of Association.

Former Article II of the Association was deleted.

Former Article III on Membership has been retained because it repeated verbatim what is in the ARTICLES on that subject.

#### ARTICLE II

##### Board of Directors

1. The powers, business and property of the Association shall be exercised, conducted and controlled by a Board of Directors of seventeen (17) members.

Number was formerly fifteen (15).

2. One Director shall be the Bishop of the Roman Catholic Diocese of Grand Rapids or his representative, who shall serve at the will of said Bishop.
3. Five of the Directors shall be Catholic priests who are members of the Association. They shall be elected, in a manner decided by themselves, by majority vote of the pastors, co-pastors, and associate pastors of the parishes which pay an assessment in support of Catholic Central and West Catholic High Schools, both of Grand Rapids, Michigan. Election of four of the priest-Directors shall be carried out within their respective dioceses; the fifth shall be elected at large. Said priests shall be elected for three-year terms as follows:

two were elected on March 1, 1973;

two were elected on the second Wednesday in May of 1974;

one was elected on the third Wednesday in May of 1975.

Election of priest-Directors shall occur in the same manner in the succeeding years thereafter, that is, two in 1976, two in 1977, one in 1978, and so on, all for three-year terms.

The earlier Bylaw did not include associate pastors, nor did it provide that four priests be elected by the respective dioceses; all five were elected at large.

The first two shall be representatives, one from the Archdiocese of Detroit and one from the Diocese of Grand Rapids, who shall serve by reason of their appointment by the Major Superiors of their respective Congregations at the will of said superiors.

5. Nine (9) Directors shall be lay men or women who shall be elected at the regular annual meeting of the members of the Association which shall be held on the third Wednesday in May, and in the same month of each succeeding year thereafter. Lay Directors shall be nominated and elected in the manner and for terms as follows:

- a. The existing lay Directors shall select a Nominating Committee consisting of three lay persons, one of whom shall be a Director and one not a Director. No person seeking election or re-election in that year may serve on the Nominating Committee.

Nominations made by the Nominating Committee shall be sent to the Secretary of the Board. Nominations may also be made by no fewer than ten (10) members of the Association and presented in writing to the Secretary of the Board. All nominations must reach the Secretary in time to be published to the electors at least thirty (30) days before the regular annual meeting of the Association. There shall be at least two nominees for each vacancy in lay Directorships.

Earlier versions provided for seven lay Directors and did not specify the time of the annual elections. Selection of the Nominating Committee was restricted to remaining Directors, and the two members chosen for that Committee selected the third member.

- b. Election of lay Directors shall be by vote of electors from each parish in or adjoining Kent County, Michigan, which pays an assessment to one of the two Catholic high schools. Said electors shall be lay persons appointed or elected in a manner to be determined by each said parish. They shall attend the regular annual meeting of the Association for the purpose of electing lay Directors to the vacancies on the Board.

Each eligible parish shall have a minimum of one elector, to be determined by the formula: one elector for each twenty (20) students (or any portion thereof) for whom the parish pays an assessment to one of the two Catholic high schools for the current year.

The parish electors shall receive credentials from their respective pastors, and upon presentation of these credentials to the Secretary of the Board of Directors at the regular annual meeting of the Association, shall be furnished with the appropriate ballot(s).

Earlier versions limited electors to a maximum of 20 to a parish.

- c. A majority of the electors present shall constitute a quorum for purposes of voting. There shall be a separate balloting from the entire list of nominees for each vacancy to be filled. If there are only two nominees for any vacancy, election shall be by majority vote of those present; in the event that there are more than two nominees for any vacancy, election shall be by plurality vote.

The stipulation of a separate balloting for each vacancy was observed for the first time in the elections of May 18, 1977.

- d. The first regular election of lay Directors occurred on March 6, 1973. This first election was to fill three three-year vacancies. At the same time, the length of term of the four remaining lay Directors was determined by random choice. Two lay Directors were elected on the second Wednesday in May of 1974, two on the third Wednesday in May of 1975, and three on the third Wednesday of June in 1976. Beginning with May, 1977, three lay Directors shall be elected each year, all for three-year terms. Lay Directors are limited to two consecutive three-year terms, with an interval of one year required before becoming eligible for election or appointment to the Board.

The random choice in 1973 resulted in one-year terms for Timothy Cooney and Richard Myalliviec, two-year terms for Gerald Hausser and Donald Shankin. Elected to three-year terms were Robert Benson, Phyllis Rosenbach, and Harry Mika.

Having three lay Directors elected each year will bring the total to eight in 1977 and to nine in 1978, and will allow for the expiration of terms of 1/3 of the lay Directors each year.

Formerly there was no stated limit to the number of terms a lay Director could serve.

- e. All lay Directors shall be elected at large, but no more than one lay Director from any one parish shall be on the Board at any time. Lay employees of the Board and their spouses shall not be eligible for election to the Board.

The above restrictions on eligibility did not appear in earlier versions.

6. Vacancies among priest-Directors shall be filled in the same manner as provided in Article II, Section 3. Vacancies among lay Directors shall be filled by vote of the existing lay Directors from a list of nominees to be compiled by a Nominating Committee of the Board. All vacancies shall be filled as soon as possible after they occur, and persons elected to fill vacancies shall hold office for the unexpired term.

Originally all vacancies, clergy included, were filled by the entire Board. The priests requested the right to fill clergy vacancies, and initiated the policy of deanery elections with one priest elected at large.

### ARTICLE III

#### Superintendent

The superintendent of Catholic Central and West Catholic High Schools shall attend all meetings of the Board of Directors, and shall carry out policy established by the Board. If there is no superintendent, the principals of the two high schools shall attend Board meetings and shall carry out policy established by the Board.

Note: If this office has been abolished or superseded, this section should be deleted or revised and brought before the Board as an amendment.

### ARTICLE IV

#### Meetings

1. The regular annual meeting of the members of the Association shall be held on the third Wednesday in May of each year for the purpose of electing lay Directors to the Board. The president or some other Director chosen by the Board of Directors shall preside at the election meeting.
2. Following the regular annual meeting of the Association, the Directors shall meet and organize themselves by the election of a President, a Vice President, a Secretary, a Treasurer, and any other officers of the Board, and shall transact any business to come before the Board.
3. The Board of Directors ordinarily meets monthly at such time and place as the Board or President may direct.

The earlier Bylaw stating the precise day of the month for meetings was replaced by a more general, more flexible statement.

4. Special meetings of the Board of Directors shall be held whenever called by the President, by a committee, or by one-third of all Directors on the Board. Any and all business may be transacted at a special meeting. Each call for a special meeting shall be in writing, signed by the person or persons requesting the same, shall be addressed and delivered to the Secretary, and shall state the purpose(s), time, and place of such meeting.
5. Notice of regular or special meetings of the Board of Directors with the proposed agenda shall be received by each Director at least five (5) days prior to the time set for the meeting.

Former version said "mailed" instead of "received".

6. Regular meetings of the Board of Directors will be public. Executive sessions may be called for by the President or by one-third of the Directors.



#### ARTICLE V

##### Quorum

A majority of the existing Directors shall constitute a quorum. A majority vote of the Directors present shall be necessary to pass any resolution or authorize any Association act, always accepting those that require a majority vote of all Directors.

"existing" has been added; "affirmative" (vote) was deleted. The earlier version limited the Articles requiring a two-thirds majority vote.

#### ARTICLE VI

##### Powers of Directors

The Board of Directors shall have power:

1. To call special meetings of the Board according to Bylaw IV, Sections 4 and 6.
2. To appoint and remove agents and employees of the Association; to prescribe their duties, fix their compensation, and require from them, if advisable, security for faithful service.
3. To select one or more banks to act as depository of the funds of the Association and determine the manner of receiving, depositing, and disbursing the funds, the form of checks and the person or persons by whom the same shall be signed, with power to change such banks and the person or persons signing said checks and the form thereof at will.
4. To conduct, manage and control the affairs and business of the Association and to make rules and regulations for the guidance of its officers and management of its affairs.

#### ARTICLE VII

##### Duties of Directors

It shall be the duty of the Board of Directors:

1. To attend all regular and special, public and executive meetings of the Board unless legitimately impeded, in which case notice should be given to the President or Secretary.

In the event that a Director anticipates an enforced absence of several months, he/she shall be empowered with the consent of the Board to select a proxy to attend Board meetings during his/her absence. Such proxy shall have the same eligibility for Board membership as the person being replaced, and shall have voice and vote.

2. To set policy and determine the general management.

3. To approve the system of bookkeeping and auditing devised by the Treasurer.

Earlier meeting did not recognize the role of the Treasurer.

4. To evaluate the performance of administrators.

5. To keep a complete record of all its acts and of the proceedings of all its meetings.

The obligation the Board to present an annual report of its proceedings has been transferred to the duties of the President.

#### ARTICLE VIII

##### Officers

The officers of the Board of Directors shall be a President, a Vice-president, a Secretary and a Treasurer, together with any other administrative officers which the Board may see fit in its discretion to provide for.

#### ARTICLE IX

##### The President

It shall be the duty of the President:

1. to preside over any and all meetings of the Association and of the Board of Directors.
2. to execute all contracts, notes, papers, documents and other instruments which have been approved by the Board of Directors.
3. to call the Directors together whenever he deems it necessary, and shall have, subject to the advice of the Directors, direction of the affairs of the Association and generally shall discharge such other duties as may be required of him by these Bylaws or by the Board, and shall appoint such committees as the Board of Directors requests or which he deems necessary to appoint.
4. to present a statement at the regular annual meeting of the Association, showing in detail the condition of the affairs of the Association.
5. The power of the President to appoint committees of the Board shall not be construed so as to preclude non-Directors from being invited to membership on Board committees with voice and vote, each such committee having a Director as its chairperson.

ARTICLE X

The Vice-president

The Vice-president shall take the place of the President and shall perform his duties if at any time the President shall be unable to act. If the President and Vice-president shall be unable to act, the Board shall appoint a Director to take the place of the President and to perform his duties.

ARTICLE XI

The Secretary

It shall be the duty of the Secretary:

1. To keep a record of all proceedings of the meetings of the Board of Directors and of the Association, and to furnish the Bishop and each member of the Board of Directors with a copy thereof not later than ten (10) days after said meeting, or at least prior to the next meeting of the Board of Directors.

Duty to keep and affix seal has been deleted — no seal.

2. To discharge such other duties as pertain to the office of Secretary or as may be prescribed by the Board of Directors (should there be something about preserving records, archives, old minutes, receiving communications, etc.?)

ARTICLE XII

The Treasurer

It shall be the duty of the Treasurer:

1. To receive and deposit all funds of the Association, to be paid out only on checks drawn as hereinafore provided, and to account for all receipts, disbursements and balance on hand.
2. To furnish a bond in such form and in such amount as the Board of Directors may from time to time require.
3. To install a system of bookkeeping and auditing such that the Board of Directors may understand and be fully advised monthly concerning the receipts and disbursements of the Association.
4. To discharge such other duties as pertain to the office of Treasurer or may be prescribed by the Board of Directors.
5. While retaining full responsibility for the foregoing duties, the Treasurer may delegate some of them to the business manager of the Board.

Earlier Bylaws allowed the Treasurer to delegate to the business manager the full responsibility for these duties.

ARTICLE XIII

Borrowing Money

The Association shall have the power to borrow money in such amounts and upon such terms and conditions as may from time to time seem advisable or necessary, by a majority vote of all Directors, subject to the approval of the Bishop of the Roman Catholic Diocese of Grand Rapids.

ARTICLE XIV

Episcopal Vote

In the event that any act passed by the Board of Directors shall not meet with the approval of the Bishop of the Roman Catholic Diocese of Grand Rapids, the Board shall be informed of such disapproval by the Director who is the representative of the Bishop.

ARTICLE XV

Amendments

The Bylaws of the Association may be altered or amended at any public meeting of the Board of Directors by a majority vote of all Directors, providing that notice of intent to amend, together with specific wording of the proposed amendment(s), is received by Directors at least five (5) days prior to the meeting at which the amendment(s) will be proposed.

Earlier Bylaw on amendments did not require prior notice of intent to amend.

A Bylaw concerning the order of business at meetings has been deleted.

ARTICLE XVI

Effective Date

These Bylaws shall become effective upon adoption thereof by majority vote of all members of the Board of Directors at a public meeting and upon written approval thereof by the Bishop of the Roman Catholic Diocese of Grand Rapids.

\*\*\*\*\*

I, the Secretary, hereby certify that at a duly constituted meeting of the Board of Directors, a resolution passed adopting these Bylaws, and that written approval thereof was received from the Bishop of the Roman Catholic Diocese of Grand Rapids.

Dated at Grand Rapids, Michigan, this \_\_\_\_\_ day of \_\_\_\_\_

In the year of our Lord Nineteen Hundred and \_\_\_\_\_

A-595

\_\_\_\_\_  
John J. Rosenthal, Secretary

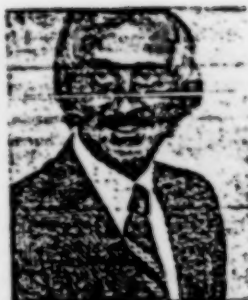
PLAINTIFFS' Ex 65



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GRAND RAPIDS CHRISTIAN SCHOOL ASSOCIATION

PLAINTIFFS' Ex 77

120

GRAND RAPIDS CHRISTIAN SCHOOL ASSOCIATION

BYLAWS

ARTICLE I. OFFICES AND OBJECTS

Section 1.1 Office. The principal office of the Association shall be located in Kent County, Michigan.

Section 1.2 Object. The purpose of the Association shall be as set forth in the Articles of Incorporation. In the event of the dissolution of the Association, its funds and properties shall be used and distributed only and exclusively for the benefit of Christian education as more specifically described in the Articles of Incorporation. The corporation and its schools shall accept enrollment without discrimination as to race, color, sex, or national origin. All rights and privileges of the corporation and its schools shall be afforded to all students.

Section 1.3 Basis. The supreme standard of the Association shall be the scriptures of the Old and New Testament, herein confessed to be the infallible Word of God, as these are interpreted in the historic Reformed confessions: The Belgic Confession, Heidelberg Catechism, and Canons of Dort.

Acknowledging that that these Scriptures, in instructing us of God, ourselves, and God's creation, contain basic principles authoritative and relevant for education, we hold that:

- (a) The authority and responsibility for education children resides in the parents or guardians of the children and not in the state or the church. Parents, however, may delegate their authority to those who can competently carry out this God-given parental right.
- (b) The primary aim of a Christian parent is securing the education of his child should be to give him a Christian education -- that is, an education whose goal is to equip the child for living the Christian life as a member of the Christian community in contemporary society.
- (c) Christian parents, when delegating the authority for educating their children, should delegate it to those institutions which seek to provide Christian education for the student.
- (d) The responsibility for maintaining such institutions rests on the entire Christian community.
- (e) The Christ proclaimed in the infallible Scriptures is the Redeemer and Renewer of our entire life, thus also of our teaching and learning. Consequently in a school which seeks to provide a Christian education it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-prevailing force in the educational program.



## ARTICLE II. MEMBERS

Section 2.1 First Members. The first members of the Association shall consist of all persons who were members in good standing of any society which was a party to the Agreement of Consolidation by which this Association was formed. Such members shall remain members until thirty days after the first annual meeting of members as provided in Section 3.2 of these bylaws. All persons who were members of a Society the assets of which are acquired by the Association shall become members of the Association, if the purchase agreement entered into by the Association so provides: Such members shall remain members for thirty (30) days after the effective date of such Agreement. Thereafter all persons shall remain members of the Association in accordance with the rules governing membership set forth in Section 2.2 hereof.

Section 2.2 Qualification. Any person possessing all the following qualifications shall be a member of the Association:

- (a) He or she shall subscribe to the basis set forth in Section 1.3;
- (b) He or she shall be eighteen (18) years of age or older; and
- (c) Either
  - (i) one or more children in his or her household attend a school of the Association, or
  - (ii) he or she makes an annual contribution of \$5.00 or more to the Association, such contribution being applicable to the school year (September 1 to August 31) during which it is made, or
  - (iii) he or she is a member in good standing of a booster club or educational society, contributes \$5.00 or more to such society and is named on the annual list of such members certified to the Association by the Club or Society.

Section 2.3 Expiration of Membership. The membership of a member shall expire on August 31 of any year, if at that date he is no longer qualified under Section 2.2.

Section 2.4 Membership nontransferable. Membership in the Association is nontransferable.

## ARTICLE III. MEETING OF MEMBERS

Section 3.1 Place of Meeting. The Board of Trustees may designate any place within the County of Kent, State of Michigan, as the place of meeting shall be the registered office in the Association in Kent County, Michigan.

Section 3.2 Annual Meetings. The annual meeting of the Association shall be held in May of each year, beginning with the year 1969, for the purpose of considering and approving the annual budget of the Association and for the transaction of such business as may come before the meeting.

Section 3.3 Special Meetings. Meetings of the members for any reason or purposes may be called by the President or the Board of Trustees.

Section 3.4 Notice of Meetings. Written or printed notice stating the place, day and hour of any meeting of members shall be delivered, either personally or by mail, to each member not less than seven (7) days before the date of the meetings, by or at the direction of the President, the Secretary, the Board of Trustees, or the persons calling the meeting. The purpose or purposes for which any special meetings is called shall be stated in the notice. If mailed, the notice shall be deemed to be delivered when deposited in the United States mail, addressed to the member at its address as it appears on the Association's record, postage prepaid.

Section 3.5 Membership List. As of a date thirty (30) days before each annual meeting of members, the Secretary of the Association shall prepare or cause to be prepared a list of all members in good standing of the Association. Such members shall be the members entitled to notice of and to vote at the annual meeting.

Section 3.6 Quorum. Fifty of the members shall constitute a quorum at any meeting of members. If a quorum is not present at any meeting of the members, a majority of the members present may adjourn the meeting from time to time without further notice. (As amended in April, 1981)

Section 3.7 Proxies. At all meetings of members, a member may vote by proxy signed by him. Such proxy shall be filed with the Secretary of the Association before or at the time of the meeting. No proxy will be valid after eleven (11) months from the date of its execution.

Section 3.8 Voting. Each member shall be entitled to one vote upon each matter submitted to a vote at a meeting of members.

## ARTICLE IV. BOARD OF TRUSTEES.

Section 4.1 General Powers. The property and affairs of the Association shall be managed by its Board of Trustees. Without limiting the generality of the foregoing, the Board shall have educational and financial powers and duties set forth in Article V hereof.

Section 4.2 First Board of Trustees. The first Board of Trustees shall consist of persons named as Trustees in the Agreement of Consolidation by which the Association was formed. The first Board of Trustees shall hold office until the annual meeting of members in 1969.

Section 4.3 Qualifications and Number of Trustees. Trustees shall be elected by members as provided in Section 5.2. Each Trustee shall hold office for the term for which he is elected and until his successor shall be elected and qualified. Each Trustee must be a member of the Association. No trustee shall serve more than two (2) successive terms on the Board of Trustees.

Two (2) Trustees shall be elected by the members of each constituent school district (elementary and High school). The number of Trustees is not to exceed twenty (20).

Section 4.4 Classification of Trustees. At its annual meeting in 1969, the Board of Trustees shall divide and allocate its members into three (3) classes with an equal or nearly equal number of Trustees in each class. The Trustees in the first class shall hold office for a term of one (1) year. The Trustees in the second class shall hold office for a term of two (2) years. The Trustees in the third class shall hold office for a term of three (3) years. Each Trustee shall serve for the term of the class in which he is placed. In 1970 and thereafter, each Trustee who is elected shall be elected for a term of three (3) years.

Section 4.5 Regular Meetings. A regular annual meeting of the Board of Trustees shall be held on the first Monday in June, without notice than this Bylaw. Additional regular meetings may be held as determined by the Board of Trustees from time to time, without notice other than the resolution establishing the time and place of each meeting.

Section 4.6 Special Meetings. Special meetings of the Board of Trustees may be called by the President or any three (3) Trustees.

Section 4.7 Notice. Notice of any special meeting of the Board of Trustees shall be given at least two (2) days before such meeting and delivered personally or sent by mail or telegram to each Trustee at his address shown on the Association's record. The purpose or purposes of any regular or special meeting of the Board need not be specified in any notice unless required by law. The attendance of a Trustee at any meeting shall constitute a waiver of notice of such meeting.

Section 4.8 Quorum. A majority of the Board of Trustees shall constitute a quorum for the transaction of business at any meeting of the Board, but if less than a majority of Trustees is present at any meeting, a majority of those present may adjourn the meeting from time to time without further notice.

Section 4.9 Manner of Acting. The act of a majority of Trustees present at any meeting at which a quorum is present shall be the act of the Board of Trustees, unless a greater number is required by law.

Section 4.10 Vacancies. Vacancies in the Board of Trustees shall be filled by the affirmative vote of a majority of the remaining Trustees, though less than a quorum. A Trustee elected to fill a vacancy shall serve for the unexpired term of his predecessor in office.

Section 4.11 Compensation. Trustees as such shall not receive any salaries for their services but, by resolution of the Board of Trustees, may be reimbursed for expenses incurred in the performance of their duties. Nothing herein contained shall preclude any Trustee from serving the Association in any other capacity and receiving compensation therefor.

Section 4.12 Informal Action. Any Action which may be taken at a meeting of Trustees may be taken without a meeting, if the Trustees shall severally or collectively consent in writing to such action.

# ARTICLE V. LOCAL SCHOOL DISTRICT AND BOARDS.

Section 5.1 Local Boards. Each constituent School Society which operated an elementary school at the time of such Society's consolidation into the Association and the High School Society, and any Society the assets of which are acquired by the Association in exchange for membership in the Association, shall continue as a school district. The Board of Trustees serving such Society at that time (called the 'local Board') shall continue as a board and shall be elected and re-elected by the members of the Association resident in such district. The local Board shall have such bylaws providing for the number and election of its board members and officers and for the conduct of its affairs as it may choose to adopt, provided that no person shall serve more than two (2) successive terms of three (3) years each on a local board, and providing that such bylaws shall not be conflict with the bylaws of the Association.

Section 5.2 Election of Trustees. Each local board shall nominate and cause to be held in accordance with its bylaws an annual meeting of all members of the Association resident in the district served by such local board, for the purpose of electing persons to serve on the Board of Trustees of the Association. Such election shall be held each year prior to the annual meeting of the Association (as provided in Section 3.2) so that the Trustees so elected may take office at such annual meeting. Each Trustee elected by members of a particular district shall be a resident of such district and shall attend meeting of the local board.

Section 5.3 Advisory Functions. The local board shall advise the Board of Trustees regarding the operation of the school in its school district, including matters of finance, planning, buildings, administration and special problems affecting the particular school or district.

# ARTICLE VI. EDUCATIONAL AND FINANCIAL AUTHORITY OF BOARD OF TRUSTEES.

Section 6.1 Educational Authority. The Board of Trustees of the Association shall have general and plenary authority, power and responsibility with respect to the educational policies in its schools, including, without limitation, the following:

- (a) To determine and establish the curricula and courses of study to be taught in its schools;
- (b) To establish grades and departments in its schools;
- (c) To hire and contract with principals, teachers, librarians and other faculty and staff, and assign such persons to its schools;
- (d) To specify, purchase and furnish books and other educational materials, supplies and equipment;
- (e) To specify or contract with the supplier of buses for transportation of students;
- (f) To establish boundary lines defining the geographical areas to be served by each school building;
- (g) To establish policies for interschool functions and relationships;

- (h) To develop, establish and carry into effect plans for the development of Christian education in those areas which are or may be served by the Association;
- (i) To make rules and regulations relating in any way to the administrative and educational policies to be followed in its schools.

Its first Board of Trustees shall consider and vote upon a policy relating to continuing contracts with professional educational personnel.

Section 6.2 Financial Authority. The Board of Trustees of the Association shall have the right, authority and power to raise funds for the purposes of the Association, including:

- (a) The power to collect from its members such amounts as may be authorized by the members to carry out the duties and responsibilities of the Association.
- (b) The power to initiate and conduct fund-raising campaigns.
- (c) The power to solicit and collect funds directly from individuals and others (who may or may not be members of this Association) in its discretion, for operating expenses, for the construction and acquisition of facilities or other capital improvements, or for debt retirement;
- (d) The power to borrow, etc., as set forth in Section 11.1.

#### ARTICLE VII OFFICERS AND SUPERINTENDENT.

Section 7.1 Officers. The officers of the Association shall be a president, one or more vice presidents (the number to be determined by the Board of Trustees), a secretary and a treasurer. All such officers shall be members of the Board of Trustees. The Board may elect or appoint such other officers, including one or more assistant secretaries and assistant treasurers as it shall deem desirable, such officers to have the authority to perform the duties prescribed from time to time by the Board. Any two or more offices may be held by the same person, except those of president and vice president, and except the of president and secretary. The Board shall also employ a superintendent of schools.

Section 7.2 Election and term of Office. The officers of the Association shall be elected by the Board of Trustees at each annual meeting of the Board. If the election of officers shall not be held at such meeting, such election shall be held as soon thereafter as conveniently may be. New offices may be created and filled at any meeting of the Board of Trustees. Each officer shall hold office until his SUCCESSOR shall have been duly elected and shall have qualified. The superintendent shall be employed with such duties and upon such terms and conditions as the Board shall determine.

Section 7.3 Removal. Any officer elected or appointed by the Board of Trustees may be removed by the Board of Trustees whenever in its judgment the best interests of the Association would be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the officer so removed.

Section 7.4 Vacancies. A vacancy in any office occurring for whatever reason may be filled by the Board of Trustees.

Section 7.5 Duties of Officers. Each officer shall perform the duties incident to his office and such other duties as shall be prescribed by the Board of Trustees from time to time.

Section 7.6 Bonds. The Board of Trustees may require any officer or agent to file with the Association a satisfactory fidelity bond, the premiums for which shall be paid by the Association.

#### ARTICLE VIII. COMMITTEES

Section 8.1 Executive Committee. The Board of Trustees may, by resolution passed by a majority of the whole Board, designate two or more of their members to constitute an executive committee which, to the extent provided in such resolution, shall possess and exercise the authority of the Board between meeting of the Board.

Section 8.2 Other Committees. The Board of Trustees may create and appoint such standing committees and such other or special committees as the Board shall deem necessary or advisable. All standing and other committees shall consist of such number of persons, who may include faculty and Trustees, shall perform such duties and shall serve for such terms of office as the Board of Trustees shall determine.

#### ARTICLE IX. CONTRACTS, CHECKS, DEPOSITS AND FUNDS

Section 9.1 Contracts. The Board of Trustees may authorize any officer or officers, agent or agents of the Association, in addition to the officers so authorized by these Bylaws, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Association, and such authority may be general or confined to specific instances.

Section 9.2 Check, Drafts, Etc. All Checks, drafts, or orders for the payment of money, notes or other evidences of indebtedness issued in the name of the Association and in such manner as shall from time to time be determined by resolution of the Board of Trustees. In the absence of such determination by the Board of Trustees, such instruments shall be signed by the Treasurer or an Assistant Treasurer and countersigned by the President or a Vice President of the Association.

Section 9.3 Deposits. All funds of the Association shall be deposited from time to time to the credit of the Association in such banks, trust companies or other depositories as the Board of Trustees may select.

Section 9.4 Gifts. The Board of Trustees may accept on behalf of the Association, any contribution, gift, bequest or devise for the general purposes or for any special purpose of the Association.

#### ARTICLE X. FISCAL YEAR

Section 10.1 The fiscal year of the Association shall be fixed by resolution of the Board of Trustees.



ARTICLE XI. POWER OF BOARD TO BORROW

Section 11.1. The Board of Trustees shall have full power and authority to borrow money up to an amount not exceeding one-twelfth of the operating budget of the Association whenever in the discretion of the Board the exercise of said power is required in the general interests of this Association and, in such case, the Board of Trustees may authorize the proper officers of the Association to make, execute and deliver in the name and behalf of this Association such notes, and other evidence of indebtedness as the Board shall deem proper, and the Board shall have full power to mortgage the property of this Association, or any part thereof, as security for such indebtedness, and no action on the part of the membership of this Association shall be requisite to the validity of any such note, evidence of indebtedness or mortgage.

ARTICLE XII. WAIVER OF NOTICE

Section 12.1. Whenever any notice is required to be given by law or under the provisions of these Bylaws, a waiver thereof in writing, signed by the person entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

ARTICLE XIII. AMENDMENTS

Section 13.1 Except for Section 1.3, these Bylaws may be altered, amended or repealed and new Bylaws may be adopted by a simple majority vote of the members present at any meeting of the members. Section 1.3 may be altered or amended only by the affirmative vote of at least three-fourths of the total number of members of the Association.

**PLAINTIFFS' Ex 82**

AUDIO PORTION OF 30-MINUTE TV PROGRAM  
SPONSORED BY GRAND RAPIDS CHRISTIAN  
SCHOOL ASSOCIATION AND AIRED ON WOTV  
APRIL 20, 1982 AT 7:30 P.M.

MR. BOLTON: From this Christian School and others like it thousands of young people have graduated who now live and work in the Grand Rapids Community. Some people criticize these schools as divisive or elitist. Schools that they perceive only the rich can afford, while others laud them as a valuable resource to the community because they are schools that practice faithfully the time proven values of a good sound education. What are Christian Schools? Why are they here? What, if anything, makes them different from public schools? This program will help you find answers to those questions.

The Grand Rapids Christian School Association is composed of six schools. Creston-Mayfield Christian School serves a rapidly expanding community in the city's northeast side. Creston is the oldest school in the Association, having been organized in 1890. The school draws students from families living as far away as Rockford and Cedar Springs. Oakdale Christian, opened in 1892, is slated to receive extensive renovation this summer. This school meets the needs of many cultures and draws children of families from over 50 individual congregations. Seymour Christian School was opened in 1921. The staff here is representative of the level of academic excellence among the teachers in the Association. With 14 full-time teachers and an additional six part-time, the staff represents an average of eight years experience. Sylvan Christian School located on Griggs Street, S.E. has one of the finest pre-school programs in all of Western Michigan. Pre-school students are taught through a series of interactions between themselves and different aspects of their environment. Millbrook Christian School is the newest facility in the Association having been built in 1954. Located just off 16th Street, S.E., Millbrook draws students from as far away as Caledonia. Grand Rapids Christian High School culminates the learning experience in Association schools. At Christian High nearly 800 students attend classes taught by a 44 member staff. Christian High School recently graduated the American Legion Oratorical Contest National Champion. On the surface, as you've seen, these schools look like any other schools. Young people learn arithmetic, spelling and geography. They have art and music classes, just like other schools have. And they enjoy the performing arts, as evidenced by this scene from "The Music Man".

There are some additions. Children in these schools attend Chapel services. They open and close each school day with prayer. They study the Bible and the history of the Christian church. We visited one class in particular, a Bible class for ninth graders at Oakdale School because it illustrates the ability of a Christian School to direct the students' spiritual growth.

**TEACHER:** May I see a show of hands of you people who are presently involved in family prayer? How many of you do that now? Alright. That's very good. I want to encourage you to believe that, because I do think that the family prayers become more vital, more important, as people participate directly in them. What were some of the types of things that you have prayed for recently? May I have some volunteers on that? Yes. Your brother who is in the Navy. What's the . . .

**MR. BOLTON:** Obviously the teacher in this class shares the values of the parents in these children's homes, and the lessons taught here each day are the same ones that the students learn in church and at home. With things like opening in prayer and an hour of Bible study everyday are not the primary reasons parents spend thousands of dollars to send their children to Christian Schools. At the heart of Christian education is a commitment to Jesus Christ. Parents see the world from that perspective and they want their children to be taught that same vision. The school is a partner with the home and the church in teaching the values, the attitudes, the ideas and the goals that Christian commitment demands. In every part of the learning process, in every class, in every activity, children are taught to keep Jesus Christ at the center of their lives. Teachers in these schools know they are molding young lives, not only for decades but for eternity.

**TEACHER:** That statement initially is frightening because it's such an awesome responsibility. But I think that the closeness of the staff and as people working together realizing that that is our goal and it is our objective, is one that keeps us going and keeps us busy and keeps us with a sense of responsibility, and I think that is a terribly important thing.

**TEACHER:** Our whole philosophy of our Christian living is based on what we teach the children and so forth. We're preparing the children for a Christian life in a community in a contemporary world, and everything that we do has to be based on Scripture, and values and morals that I teach will be based on Scriptures, and I think that can be intertwined in everything that I teach - very specifically in Bible lessons, of course, and Devotions, but

we're teaching the children love and patience and kindness and so forth, and I guess I feel that that has to be their whole outlook on life and that's intertwined in everything that we do. I would hope that we're not just teaching for education, but we're teaching for the whole child - for his spiritual development, for his social development and, of course, for the academic development and we hope that that will have a long-range lasting effect on the student.

**TEACHER:**  
(Connie  
Vander-  
Well)

**MR. BOLTON:** This is what students told me about attending a Christian School:

**STUDENT:** A good atmosphere for me to be in and everybody has the same mutual belief in how to live their lives and we all believe in the Christian faith and so we can talk about it with each other.

**STUDENT:** Oh, because it's Christian and I learn lots of things in the school. I learn some hard things and it's kind of a challenge and to see if I can do everything.

**MR. BOLTON:** Do you think going to a Christian School is better than, say going to some other school?

**STUDENT:** Yeh.

**MR. BOLTON:** Why?

**STUDENT:** Because you learn about God and you wouldn't learn about God in like public schools or anything.

**MR. BOLTON:** You like to learn about God?

**STUDENT:** Mm. Mm.

**MR. BOLTON:** Because a school is an extension of the home, and supported financially by the parents, they are vitally interested in the control and guidance of the schools. Parent-Teacher conferences are very well attended as families and school work together to develop the children's abilities. Special meetings of parents are sometimes called for special reasons. This meeting at Oakdale School is a prayer meeting to ask God's guidance and blessing on a fund drive. Each school has a board made up of parents. That board provides direction and policy for the administration of the school. In addition, more parents serve on the board of the Christian School Association. When we ask parents why they chose to send their children to Christian Schools, their answers reflect their concern for classroom environment - a concern for an excellent educational program - and a commitment to a Christ centered foundation for the entire educational process.

**PARENT:** Well, I happen to be a grandparent of children and I know how these parents feel. It's just a very, very vital extension of the home and part of the Christian education which they are trying to promote.

PARENT: I think it's headed by Jesus Christ and I think it will be an example to the world as to what Christ wants his body to be like and that is to be united in one spirit. We are all united. We are all God's children and that we can work together.

PARENT: The common thread through all of the parents and the children in this school is that they have a faith in God through Jesus Christ and they want to live that faith and develop that faith in a common community, and that's what we have here - a Christian community.

MR. BOLTON: Most of the parents who send their children to Christian Schools pay the tuition themselves. Parents who make up the Association represent a cross-section of families ranging from poor to wealthy. However, most of the people are average middle-class parents who often make a real financial sacrifice to meet tuition expenses. We discussed the financial aspect of Christian education with a couple from Seymour School. Chuck, is tuition a burden?

CHUCK VANDER SLOOT: I wouldn't call it a burden, Dave. It's a payment to make I guess, and it's one that we commit ourselves to at the time we enroll our children and from that point on you treat it like house payments or tax payments or gasoline for the car. It's something that has become a part of our cost of living.

MR. BOLTON: Chris, obviously I assume you think it's worth it.

CHRIS VANDER SLOOT: Right. I think it's a matter of setting your priorities and for us, and many others, this is one of the priorities. I've had the opportunity to talk to different parents and often the issue of tuition did come up, and I found that for the most part, even though for some parents it was really quite a hardship, they really were excited about the education their children were getting and they just really felt this was worthwhile. It was also a chance for them, I think, to teach their children about values. I think that a lot of the children know that their parents are sacrificing something for them, but yet they're teaching them the quality of life rather than quantity of possessions, and I think this is a worthwhile lesson and most of the parents I think really feel that this is true.

MR. BOLTON: When parents cannot pay the full cost of tuition for their children, their local church may help through freewill offerings from other church members. These parents experience the support and concern of the entire Christian School community.

While the cost of education is paid in most cases by parents of children who are now in school, other costs are met by all members of the school community. Buses, buildings and other capital expenditures are paid for through special fund drives. Dr. Warren Boers, President of the Grand Rapids Christian School Association Board and Co-Chairman of a current fund drive called "Focus On Christian Education" - we talked with him about the role that fund drives play in raising the money to meet Christian School community needs. We have commonly used fund drives to cover expenditures over and above the cost of education. Basically, the cost of education for students is paid by the parents. A couple of examples of additional expenditures would be capital improvements on our buildings and new buses. This year the drive goal is much higher than usual because our oldest school, Oakdale, is in need of a long overdue extensive renovation. The Association also needs to purchase a new bus this year and make some necessary improvements on some of our other buildings. In addition to those needs, difficult economic times have resulted in a deficit in our general fund. So it is a big challenge.

In the past, our drives have invariably been successful and in spite of the present economy, we're hoping that conditions will change as the year goes along, our Association members and interested friends will just dig a little deeper this year in order to help us achieve our goals. That kind of loyalty and generous giving has always been one of our strengths. It binds us together and keeps us going, and for that we are very thankful to God.

MR. BOLTON: Projects such as this drive depend heavily on volunteer support throughout the Association. We talked with some parents in the Sylvan School District about their involvement. How are you involved? What do you do?

RICH BAKER: I personally am involved in the Master Gift Giving Guide which involves calling on the area businesses and asking for their financial support for the Christian School drive. I am also a member of the Sylvan School Board and as a board member, we have appointed a chair person to head up the drive among the parents of Sylvan School.

MR. BOLTON: And Fran, you're involved too?

FRAN BAKER: Yes. I will also be calling and I will be asking people to give their money and prayers for the school. We need both very much.



MR. BOLTON: We also visited the School Association Offices to discuss the "Focus" campaign with Mr. William Gritter, Superintendent of the Grand Rapids Christian School Association. Mr. Gritter, what are the specific goals of the fund drive?

WILLIAM GRITTER: The fund drive has three components, Dave. The first component is the operating fund deficit. The second component is the Oakdale renovation and the third component is other capital needs that we have at our Association, such as roof repair, bus replacement, portable classrooms for one of our other district schools.

MR. BOLTON: What does that come to? What is the total amount that you need then?

WILLIAM GRITTER: The total amount is \$1,000,000.

MR. BOLTON: Mm. \$1,000,000 is a lot of money - especially in these troubled economic times. Do you think that you'll make your fund drive goal?

WILLIAM GRITTER: We're confident that we can meet the goal. It is a large amount - we realize that, but we do have real and urgent needs and if they are presented clearly, we believe that the families will respond. I might add that we have several thousand members in our Association and these thousands of members are committed to providing an excellent program and excellent facilities for the children who attend these schools. They have a sense of community - a sense of responsibility for providing Christian education for these children. And I might add too, Dave, that our system of schools adds to the quality of life in Grand Rapids and we're hopeful that the broad Grand Rapids community will be supportive of us in this drive also.

MR. BOLTON: And so you feel that because the needs are real and urgent the people in your constituency will come through?

WILLIAM GRITTER: No question about it. When we present the needs, our history has been that the people respond.

MR. BOLTON: We've come to Oakdale School for a first-hand look at the Oakdale project. Some people might say that \$700,000 is a lot of money to invest in a neighborhood such as Oakdale. Mr. Gritter, this neighborhood is certainly an older part of the city and some people might wonder if it's worth putting a lot of money into this school. How would you respond to a question like that?

WILLIAM GRITTER: Well, Dave, the Association did a very thorough study of the area before proceeding with the plans and the study showed rather convincingly that the neighborhood is

stabilizing, that young families are moving in and they want their children educated here at Oakdale. Also, a very important factor is the increasing enrollment that we're experiencing in the Association and we just need the space here at Oakdale in order to house our students and that's a very important consideration for us because in our other district schools we are experiencing some crowded conditions. In fact, at one of our district schools, Creston, we're going to be using three portable classrooms next year. So the space here at Oakdale is very important to us and thus this renovation project is very important as far as the future is concerned.

MR. BOLTON: This building dates back to 1924. It's definitely in need of renovation, but like many buildings constructed in the '20's, this building is structurally sound.

DR. WARREN BOER: Specifically, the renovation at Oakdale will include refurbishing classrooms, restrooms, corridors and stairs. The building will need new exterior windows and doors. We need to install a restroom on the third floor and replace exterior hardware and doors. We need some new boiler piping. We'll need to upgrade existing electrical systems. There will be partial re-roofing necessary and new classroom furniture and equipment.

MR. BOLTON: Those life-long residents of this area and those who have recently moved in express a lot of confidence in the Oakdale neighborhood and this school. Mr. George Brander has lived in the Oakdale area for most of his 100 years. He went to school here at Oakdale in 1893. Mr. Brander, you are a supporter of the Oakdale area and this school in particular. Why do you feel that it is so important to renovate this school?

GEORGE BRANDER: Well, I must say I supervised the construction of this building when it was built in 1923. That was the major part of this building and I feel that it is a good structure, but I do believe that time has come that it needs renovation for there are many people who live in this little section in this area who want their children to go to Oakdale School and we should give them a good facility while they're attending this building.

MR. BOLTON: We're talking to Glen and Linda Weaver who recently moved into the Oakdale School area, and I guess basically what I would like to ask the two of you is why did you move into the area and why would you want your children to come to the

Oakdale School? Who wants to start out first?

LEN WEAVER: I suppose one reason we moved into this area was a very practical one. We found very good housing values in this neighborhood and we've been very pleased with the home that we bought, but there were deeper reasons too. As we looked into the neighborhood, we found that it seemed to be a very interesting place to live with the number of different ethnic backgrounds represented and the number of community opportunities too - neighborhood associations, libraries, things such as that.

MR. BOLTON: Linda would you have anything to add to that?

LINDA WEAVER: Well we also looked for a neighborhood with a number of small children in the area so our children would have other children to play with and we found that here. And we also enjoyed the school - we heard many good reports about the Christian School here and the dedicated teachers and we thought it would be a good place to send our children.

MR. BOLTON: Also with us is Mr. Mike Bruinooge who has lived here in Oakdale for only three years. Mr. Bruinooge, why do you like this area and this school?

MIKE BRUINOOG: Well we like the area because it's a stable area. I like the old homes. We have very fine neighbors - it's a pleasant place to live and we moved, I guess mainly because of Oakdale Christian School. We moved to this area because we see in Oakdale a school that has a quality education for our children - a Christian education - and it's multi-cultural and multi-racial and all those things are really important to us.

MR. BOLTON: So you feel that there's a good solid future for you and your family here in the Oakdale area with your children attending this school then?

MIKE BRUINOOG: We don't have any doubt of it. We're really happy here.

MR. BOLTON: Earlier when we talked to Superintendent Gritter, you'll recall that we learned of the \$1,000,000 goal for this year's "Focus" campaign. Here at Oakdale School, parents and students demonstrated their enthusiasm and commitment to the "Focus" campaign by conducting a pace-setter drive which garnered in excess of \$100,000. As Principal of Oakdale Christian School, we asked Mr. Ron Boss for his comments on the Oakdale project.

RON BOSS: Well, first of all Dave, we're really excited about this project. A number of us have been working very hard for a number of years. We sensed that the neighborhood has stabilized. We

believe that the school performs a very valuable service here. We know that the building needs to be renovated - it will certainly help what we're trying to do program wise. We also felt that this school was important in this community. We have a community attitude about what we're doing. We believe the community understands what we're doing. We believe that the community wants us to be here and, we as Christians believe that we do have something to offer to the City and to this community that comes from our basic belief in God and in the Bible and in the stability of the family.

MR. BOLTON: Obviously it takes more than enthusiasm and optimism to accomplish goals like those outlined in this brochure - and we're talking to Mr. John Van Lopek, Business Manager of the Grand Rapids Christian School Association about his feelings regarding the campaign.

JOHN VAN LOPEK: Thank you Dave. This campaign provides a tremendous opportunity for the entire community to respond through its strong financial support. We want to encourage all families and friends to consider making a one-year pledge. For those without children in school, the general guideline is \$5.00 per week. For those with children in school, the suggested weekly pledge amount is \$3.00. With this type of financial support from the total community, our needs will surely be met.

MR. BOLTON: This feeling of community is illustrated by the fact that students from each Association School come here to Grand Rapids Christian High. Mr. Earl Schipper and his religion class met with us to talk about the benefits of a Christian education.

EARL SCHIPPER: Some of you probably have stronger ideas about Christian education than others because some of you have come from non-feeder schools.

STUDENT: I think it helps cement what our parents want for us. When you go out into the world it's necessary to have a set system of values and going to a Christian school you get those values set deeply enough so that when you go out into the real world and encounter people of many different beliefs and morals and stuff like that, you can stick to your own set of values.

STUDENT: I think there's more of a personal atmosphere. Everybody cares about you. You don't feel alone as much as you might in a non-Christian school.

STUDENT: I came from a public school so it's been a really big change. You get a lot more interaction between all the different groups of kids.

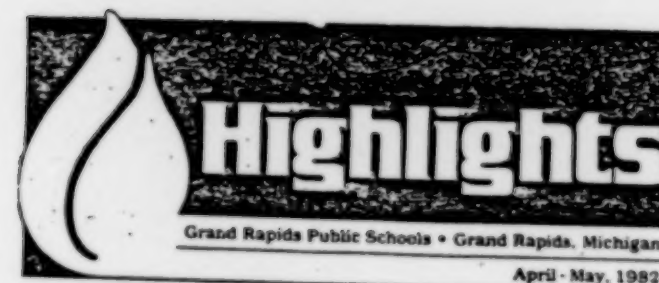
**STUDENT:** We have many different religions in here while one main religion, Christianity, but within that we have our Christian Reformed, Reformed, Lutheran, Baptist, and by having the religion class meeting we can hear everybody's main things from what their denomination or whatever and we're able to talk to it and be open to everybody else's ideas and stuff.

**STUDENT:** The teachers are a little more caring in school because, well, they're Christians and they're taught to take care of their kids in class and you know - help them to grow in the Christian way of life. Christianity is the way to grow up.

**EARL SCHIPPER:** I don't know, I think that if you talk about the value of Christian education you all mention the fact that teachers really seem to care a lot more - that's the one thing that I notice around here. The teachers really care about individual students, what problems they're having, what's going on in their homes, and I think in addition to that there is always an attempt to integrate your Christianity into every area of life so that you see your Christianity in an area of mathematics, biology and sociology and all of these Christian values incorporate your total academic experience and I think that's an invaluable thing to have.

**MR. BOLTON:** This focus on Christian education has touched briefly on the ideals of Christian education - what it is and how it works on a daily basis. Now, we've looked at the immediate goals of the capital fund drive which is in progress and we have talked about the feeling of community that makes up the Grand Rapids Christian School Association. Our goals have been to introduce Christian education to you viewers who may be considering a Christian education for your children. We also wanted to examine and explain the various components of the current fund drive to those of you who are members of the Association. The theme for this fund drive and the title of this special half hour is "Focus On Christian Education". We hope that it has been an informative program, and on behalf of the Grand Rapids Christian School Association, I thank you for tuning in.

## PLAINTIFFS' Ex 91



## TROUBLED TIMES

These are tough times for the public schools. Our poor economy has dictated drastically reduced funding for public education. Until the economic situation improves, school districts like ours are going to suffer.

In previous HIGHLIGHTS, we have mentioned a few of the difficult decisions the board and Superintendent Dow have had to make in order to adjust to financial cutbacks. The severest of these cutbacks have been at the state level. Here now is a review of recent funding decisions by the state and their effect on the Grand Rapids Public Schools.

Schools have suffered much recently due to Executive Order Deductions (E.O.D.'s). E.O.D.'s are reductions in the state budget taken after it has already been accepted by the state legislature. Last September, Governor Milliken issued a \$135 million E.O.D. from the state budget. Aid to schools and colleges had to be cut significantly. The Grand Rapids Public Schools' budget was reduced by \$324,000.

Just three weeks later, the Governor had to issue another E.O.D. of \$270 million. This meant that our district lost another \$474,000. In less than a month, our budget had to be adjusted down almost \$800,000.

Fortunately, the Superintendent and his staff had foreseen possible cuts when they planned the district's budget. Our educational programs would not suffer substantively, although further reductions in staff were inevitable.

Since January of 1981, the GRPS work force has been reduced by more than 880 employees. According to Superintendent Dow, this particular course of action "has been very, very painful, but has enabled us to remain financially stable while protecting our programs."

This past March, Governor Milliken announced another E.O.D. of \$450 million. The GRPS will lose another \$700,000, bringing our total in state aid reductions - within a six month period - to approximately \$1.5 million.

Along with this, the governor's budget message on March 10 included notice that all community colleges, including Grand Rapids Junior College, will not receive their fourth quarter state aid payments (July - September). For GRJC, this payment equals \$1.7 million. The Governor added, however, that if the economy improves enough he intends to replace this lost payment sometime next fiscal year.

The fact is that even if the \$1.7 million in state aid is replaced next fiscal year - and there is no guarantee that it will be - the Junior College will suffer an immediate loss in interest earnings of \$80,000 which must be cut from its budget and will not be replaced by the state.

From 1969 to 1981, the state has lowered its general fund contribution to education (both K-12 and colleges) from 58% to approximately 46%. In fiscal year 1978-79, the state designated over \$900 million for K-12 education. Next year, this contribution in state aid will be only \$250 million.

According to David Haynes, the GRPS director of Federal and State relations, "if this trend continues, the state will be contributing zero dollars from the general fund in 1983-84. Financial support for public education would then have to come entirely from local property taxes and from the Michigan School Aid Fund - sales tax, the lottery and special taxes."

Now, in planning for the 1982-83 school year, the Superintendent is preparing for additional staff reductions in order to work within available revenue. During the 1980 millage campaign, Superintendent Dow promised the community of Grand Rapids not to ask for any additional millage for three years and he intends to fulfill this commitment.



**FILED**

No. 83-990

**MAY 11 1984****IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983****ALEXANDER L. STEVAS.  
CLERK****THE SCHOOL DISTRICT OF THE CITY OF  
GRAND RAPIDS, et al,****Petitioners,****v.****PHYLLIS BALL, et al,****Respondents.****ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT****VOLUME II  
JOINT APPENDIX****FRANK J. KELLEY**

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**JOINT PETITION FOR CERTIORARI FILED  
DECEMBER 15, 1983****CERTIORARI GRANTED FEBRUARY 27, 1984**

171PP

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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

AMERICANS UNITED FOR  
SEPARATION OF CHURCH AND  
STATE, et al,

Plaintiffs,

vs.

SCHOOL DISTRICT OF THE CITY  
OF GRAND RAPIDS, et al,

Defendants,

and

IRMA GARCIA-AGUILAR and  
SIMON AGUILAR, et al,

Defendants-Intervenors.

Case No.  
G80-517-CA1

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JOINT PROPOSED FINDINGS OF FACT AND  
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DEFENDANTS AND INTERVENORS

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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

AMERICANS UNITED FOR  
SEPARATION OF CHURCH AND  
STATE, et al,

Plaintiffs,

vs.

SCHOOL DISTRICT OF THE CITY  
OF GRAND RAPIDS, et al,

Defendants,

and

IRMA GARCIA-AGUILAR and  
SIMON AGUILAR, et al,

Defendants-Intervenors.

Case No.  
G80-517-CA1

JOINT PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON BEHALF OF  
DEFENDANTS AND INTERVENORS

FINDINGS OF FACT

NOW COME the defendants and party intervenors, by and through their respective attorneys of record, and submit the following Joint Proposed Findings of Fact and Conclusions of Law:

I. GRPS Philosophy Of Education

1. The Board of Education of the Grand Rapids Public Schools (hereinafter referred to as "GRPS" or the "Board") has

adopted an official policy regarding its basic Philosophy of Education, which policy was adopted on January 3, 1972.

*Reference:* GRPS Ex FFF; Vrugink, Vol VIIA, pp 1069-1070.

2. "The Grand Rapids Board of Education is committed to provide for each student, an equal opportunity for a quality education.

Education is an endeavor or process which seeks to develop an excellence of mind, spirit, and attitude of which man is so uniquely capable and having as its ultimate goal the happiness and fulfillment of each individual and the welfare of society.

The Board recognizes that no two students are alike; they have differing needs, differing abilities, differing aspirations. The Board seeks the fully developed individual, maximizing his potential, talents, and interests. The Board is concerned for the exceptional child and will provide opportunities for both the talented and the handicapped.

Education in Grand Rapids Public Schools shall enable each individual to:

- A. Acquire the basic skills.
- B. Apply rational intellectual processes to the identification, consideration, and solution of problems.
- C. Develop a comprehension of a changing body of knowledge of the various disciplines.
- D. Learn good health and safety habits as well as muscle coordination.
- E. Experience an environment that will motivate and develop an inquisitive mind capable of critical and objective thinking and independent study.

- F. Progress toward a marketable skill.
- G. Realize the interdependence and the common destiny of all citizens of the United States.
- H. Become a citizen who has a sense of self respect, who respects the person and rights of all others, who accepts the responsibilities and disciplines of our society, and who respects the law.
- I. Understand and deal with social problems thoughtfully and objectively.
- J. Have an opportunity for continuing education.

Education is a cooperative endeavor requiring reciprocal effort on the part of the teacher and students supported by the cooperation of parents and the community.

The Grand Rapids Public Schools shall utilize all available facilities and equipment to provide a healthful and stimulating educational environment. School facilities shall be used for the regular program, continuing education, and the community."

*Reference:* GRPS Ex FFF.

3. The Philosophy of Education of the GRPS serves as an important basis for the varied educational programs provided by the district.

*Reference:* Pojeski, Vol VA, pp 895, 901-903; Vrugink, Vol VIIA, p 1070.

4. In addition, the present administration (i.e., Dr. John Dow) of the Board has vigorously pursued in recent years a "Campaign for Excellence" theme similarly designed to enhance the academic achievement levels of GRPS students, to improve the efficiency of the operation of the district, and to

develop new and creative ways to improve citizen and parent participation in the affairs of the school district.

*Reference:* Vrugink, Vol VIIA, p 1071.

5. This theme for the '80s, together with the district's Philosophy of Education, along with other factors, serves as the basis for the educational opportunities made available through the GRPS, including the Shared Time (i.e., regular school day) and Community Education (i.e., before/after school) programs.

*Reference:* Vrugink, Vol VIIA, p 1071; GRPS Ex EE.

## II. GRPS Programming

### A. Programming Overview

6. The goal of the GRPS is to provide educational opportunities for the whole community.

*Reference:* GRPS Ex EE.

7. The term "community" in the Grand Rapids context takes on special significance because of the unique makeup of the Grand Rapids area in terms of the large number of families who choose to send their children to nonpublic schools.

*Reference:* GRPS Ex TTT, p 9; Vrugink, Vol VIIA, pp 1097-1098.

8. The GRPS is a school system accredited by both of the accrediting entities in the state, the North Central Association of Colleges and Schools and the University of Michigan.

*Reference:* Vrugink, Vol VIIA, p 1077.

9. Since the early 1970's, the GRPS has been widely recognized for the wide range of educational experiences which it makes available through its elementary education program, not only in providing a complete curriculum for elementary school students at some 42 sites, grades kindergarten through sixth, but also because of its prekindergarten program (1,715 participants), its alternative schools program (105 students participate), its spectrum program for gifted and talented students (360 students participate), its lighthouse program for those students who enjoy the adventure of learning (1,200 students participate), but also because of its environmental studies program for sixth graders (110 students presently participate).

*Reference:* GRPS Ex EE; Vrugink, Vol VIIA, pp 1072-1075; GRPS Ex JJ.

10. On the secondary level, in addition to its complete curriculum for high school students in grades 7 through 12 attending the four GRPS senior high schools and the five GRPS middle schools, the district also provides CETA youth employment programs in which 1,000 students participate, a four-phase driver's education program involving 2,800 participants, a park school designed to serve pregnant students, alternative high schools for those students who have been unable to succeed academically or behaviorally at their base school (450 participants), the Grand Rapids Job Corp Center, providing residential vocational educational training for youths (1,200 participants), the Junior ROTC (526 participants), City High, an alternative high school for highly motivated students (320 participants), and Educational Park, providing unique courses, special teachers and methods which involve some 2,500 participants.

*Reference:* GRPS Ex EE; Vrugink, Vol VIIA, pp 1075-1081; GRPS Ex JJ; GRPS Ex OOO; GRPS Ex PPP; GRPS Ex QQQ.



11. Consistent with the scope of the Philosophy of Education noted earlier, the GRPS sponsor a very large Community Education program which serves the various needs of the community by providing a vast array of educational services to approximately 35,000 students.

*Reference:* GRPS Ex EE; Vrugink, Vol VIIA, pp 1081-1088; GRPS Ex KKK.

12. The Community Education offerings are made available not only before and after the regular school day, but also during the evening hours, which offerings are provided at a variety of locations, no less than 260 in number, including factories, senior citizens centers, hospitals and public and non-public schools.

*Reference:* Vrugink, Vol VIIA, p 1083; GRPS Ex KKK, p 27; Young, Vol VIIIA, p 1317.

13. The GRPS also provides a variety of special programs, such as Grasp, a summer correspondence program in math and reading (3,077 participants); Community Child Watch, a program designed to further and promote child safety to and from school; a bilingual program, meeting the needs of non-English speaking children (350 participants); and an exhibit loan service, providing short-term loans of mounted specimens and kits in cooperation with the Grand Rapids Museum (55,000 participants).

*Reference:* GRPS Ex EE; Vrugink, Vol VIIA, pp 1089-1092.

14. The GRPS, in cooperation with the city of Grand Rapids, is also involved in the Recreation Department providing leisure and avocational activities for children, adults and the elderly of the city of Grand Rapids.

*Reference:* GRPS Ex EE; Vrugink Vol VIIA, pp 1088-1099.

15. The GRPS in the field of special education, provides no less than 32 separate programs for children with physical, mental or emotional disabilities, which programs provide absolutely essential services to no less than 10,000 participants.

*Reference:* GRPS Ex EE.

16. The GRPS is also involved in providing college level courses through Grand Rapids Junior College.

*Reference:* GRPS Ex EE.

#### B. Shared Time/Community Education

17. The Shared Time and Community Education programs of the GRPS, offered on leased premises and elsewhere, represent additional educational programs which are offered to the community, consistent with the district's commitment to providing a wide range of educational experiences for the benefit of the students of the total community.

*Reference:* GRPS Ex EE; Pojeski, Vol VA, pp 895, 901-903; Vrugink, Vol VIIA, pp 1071-1091, 1097; Int. Ex A, Tab C, ¶16.

#### C. Statistics

18. The total operating budget for the GRPS for the school year 1981-1982 is just under One Hundred and Twelve Million dollars (\$112,000,000.00).

*Reference:* GRPS Ex FF; Vrugink, Vol VIIA, p 1092.

19. The budget for the daytime portion of the Shared Time program (during regular school hours) is \$1,923,000 or 1.7% of the total operating budget for the district.

*Reference:* GRPS Ex FF.

20. The Community Education portion of the Shared Time program (on leased premises) in the before school, after school and evening program, is \$926,000, or 0.9% of the total operating budget for the district.

*Reference:* GRPS Ex FF.

21. In the GRPS district there are 42 elementary schools, 5 middle schools and 4 high schools, all of which are depicted by location on GRPS Ex JJ, a map of the city of Grand Rapids.

*Reference:* GRPS Ex JJ.

22. The GRPS provide elementary instruction to just over 14,000 full-time students.

*Reference:* GRPS Ex TTT, p 4.

23. On the high school level, the GRPS provide teaching instruction to just over 6,000 full-time students, and on the middle school level, to approximately 3,500 full-time students.

*Reference:* GRPS Ex TTT, p 5.

24. The total enrollment for the GRPS as of the 4th Friday count on October 2, 1981, was 26,142 full-time students, in the kindergarten through 12th grade programs.

*Reference:* GRPS Ex TTT, p 9; Vruggink, Vol VIIA, p 1121.

### III. Shared Time

#### A. Definition

25. The Shared Time program consists of GRPS course offerings (following a GRPS curriculum) for youngsters which

are supplemental (i.e., noncore curriculum) and secular in nature, taught by subject area specialists.

*Reference:* Vruggink, Vol VIIA, pp 1097, 1101; GRPS Ex LL; GRPS Ex MM; GRPS Ex BB; GRPS Ex OO; GRPS Ex PP; GRPS Ex RR; GRPS Ex QQ; GRPS Ex TT; GRPS Ex SS; GRPS Ex Y, ¶13; GRPS Ex AA, ¶13; GRPS Ex BB, ¶9; GRPS Ex Q, ¶14; GRPS Ex J, ¶17; GRPS Ex B, ¶14.

26. The Shared Time program is a child benefit program designed to help students by providing supplementary, secular educational opportunity.

*Reference:* Bylsma, Vol VIIIB, pp 1388-1393; Pojeski, Vol VA, pp 895, 901-903; GRPS Ex FFF; GRPS Ex III, ¶5; Cichewicz, Vol IIA, p 306; Vruggink, Vol VIIA, pp 1097-1098; Young Vol VIIIA, p 1325; Dwyer, Vol IVA, pp 681, 693; Mish, Vol IA, p 68; Jaksa, Vol IVA, pp 734-735; Gritter, Vol IIIA, p 462; Wagner, Vol IIIA, pp 504, 519-520, Vol IIIB, p 556; Prong, Vol VIIIB, p 1253; GRPS Ex B, ¶18; GRPS Ex C, ¶17; GRPS Ex D, ¶16; GRPS Ex E, ¶¶10, 18; GRPS Ex F, ¶¶19, 20; GRPS Ex H, ¶16; GRPS Ex I, ¶11; GRPS Ex K, ¶¶9, 11, 17; GRPS Ex L, ¶23; GRPS Ex M, ¶9; GRPS Ex N, ¶16; GRPS Ex!, ¶¶14, 23; GRPS Ex R, ¶27; GRPS Ex T, ¶26; GRPS Ex W, ¶¶16, 23; GRPS Ex Z, ¶16; GRPS Ex BB, ¶¶18, 20; GRPS Ex CC, ¶21; GRPS Ex DD, ¶21; Int Ex A, Tab B, ¶¶6, 7, 8; Int Ex A, Tab C, ¶16; Int Ex A, Tab D, ¶16; Int Ex A, Tab E, ¶11; Int Ex A, Tab F, ¶¶8, 9, 10, 11; Int Ex A, Tab G, ¶14; Int Ex A, Tab H, ¶¶5, 6, 7, 12; Int Ex A, Tab I, ¶¶5, 9; Int Ex A, Tab M, ¶¶7, 10.

27. The Board of Education of the GRPS decided to provide the course offerings in the Shared Time program because such offerings were consistent with the overall educational philosophy of the district, and further because the Grand Rapids community is a unique community in which there

are a large number of families who choose to send their children to nonpublic schools, and these children have educational needs which the Board, through the operation of the Shared Time program, attempts to meet.

*Reference:* Pojeski, Vol VA, pp 8<sup>cc</sup> 901-903; Vruggink, Vol VIIIB, pp 1097-1098, 1123, 1147, 1198; Int Ex A, Tab B, ¶7.

28. The term "Shared Time" refers not only to the sharing of the GRPS teachers, but also the sharing of the nonpublic school students, and their time as part-time public school students.

*Reference:* Vruggink, Vol VIIA, p 1097.

#### B. History

29. The Shared Time program in its present form started in 1976 and came about following certain decisions handed down by the Michigan Supreme Court and the Michigan Court of Appeals upholding the constitutionality of shared time instruction on leased premises under conditions of public school control.

*Reference:* Vruggink, Vol VIIA, p 1098.

#### C. Course Offerings

30. Through the Shared Time instructional program, the GRPS provide educational services in the areas of art, math (remedial and enrichment only), music, physical education, reading (remedial, developmental and enrichment only), educational park, industrial arts, and outdoor education.

*Reference:* GRPS Ex GG.

31. The number of educational services provided through

the Shared Time program has not significantly increased in the past four years.

*Reference:* Mish Vol IA, p 81; Boss Vol IVA, p 643; Dwyer, Vol IVA, p 677; Johnson, Vol VA, pp 842-843; Plaintiffs' Ex 90, Answer 64.

32. The secular educational opportunities provided by the Shared Time program represent courses which are supplementary to the core curriculum of the nonpublic schools which have students participating in the program.

*Reference:* Mish Vol IA, pp 69-70, Vol IB, pp 179-180, 187; Jaksa, Vol IVA, p 728; Vruggink, Vol VIIA, pp 1097, 1100, 1101, 1106, 1107; Cichewicz, Vol IIA, p 307; Gritter, Vol IIIA, p 442; Kroon Vol VIIIB, p 1205-1206; Int Ex A, Tab B, ¶7; Int Ex A, Tab D, ¶6; Int Ex A, Tab M, ¶8; Int Ex A, Tab N, ¶5; GRPS Ex B, ¶¶13, 14; GRPS Ex E, ¶10; GRPS Ex F, ¶12; GRPS Ex G, ¶20; GRPS Ex I, ¶11; GRPS Ex K, ¶¶11, 17; GRPS Ex L, ¶11; GRPS Ex N, ¶10; GRPS Ex BB, ¶13; GRPS Ex DD, ¶11; GRPS Ex C, ¶12.

33. The elementary nonpublic schools in the city of Grand Rapids whose children participate in the instructional offerings of the Shared Time program, have complete core curriculums outside of the course offerings made available through the Shared Time program.

*Reference:* Mish Vol IA, p 69, Vol IB, pp 184, 186, 187; Gritter, Vol IIIA, p 480; Jaksa, Vol IVB, p 728; Johnson, Vol VA, pp 833, 847; Int Ex A, Tab A, ¶¶6, 11; Int Ex A, Tab B, ¶7; Int Ex A, Tab C, ¶6; Int Ex A, Tab D, ¶6; Int Ex A, Tab G, ¶9; Int Ex A, Tab N, ¶9; Ex 1-7, 11, 18, 21-24, 46-58.

34. The courses made available through the Shared Time program on the elementary level would not otherwise be avail-



able in any of the nonpublic schools who have children now participating in the program.

*Reference:* Mish, Vol IB, pp 179-180; Cichewicz, Vol IIA, p 306; Dwyer, Vol IVA, pp 689, 693, 698; Johnson, Vol VA, pp 844, 845; Mirandette, Vol VIIIA, pp 1306, 1313, 1314; Int Ex A, Tab B, ¶¶6, 7; Int Ex A, Tab D, ¶16; Int Ex A, Tab E, ¶12; Int Ex A, Tab G, ¶14; Int Ex A, Tab H, ¶12; Int Ex A, Tab I, ¶9; Int Ex A, Tab K, ¶¶8, 9; Int Ex A, Tab L, ¶¶3, 4; Int Ex A, Tab M, ¶¶9, 10; GRPS Ex I, ¶11; GRPS Ex J, ¶18; GRPS Ex N, ¶10; GRPS Ex R, ¶27; GRPS Ex W, ¶16; GRPS Ex Z, ¶16; GRPS Ex BB, ¶13.

35. The course offerings made available through the Shared Time program do not serve as a substitute for any portion of the base curriculum of any of the elementary nonpublic schools who have children now participating in the Shared Time program.

*Reference:* Mish, Vol IB, pp 179-180, 186; Dwyer, Vol IVA, p 689; Johnson, Vol VA, pp 843-844; Jaksa, Vol IVB, p 728; Kroon, Vol VIIB, p 1206; Rowlands, Vol VIIB, pp 1269-1270; Int Ex A, Tab B, ¶7; Int Ex A, Tab D, ¶16; Int Ex A, Tab G, ¶14; Int Ex A, Tab H, ¶12; Int Ex A, Tab I, ¶9; Int Ex A, Tab K, ¶¶8, 9; Int Ex A, Tab L, ¶¶3, 4; GRPS Ex K, ¶11; GRPS Ex N, ¶10; GRPS Ex Q, ¶14; GRPS Ex U, ¶12; GRPS Ex BB, ¶13; GRPS Ex DD, ¶11.

36. None of the Shared Time course offerings on the elementary level are required either for graduation or successful progression from grade level to grade level.

*Reference:* Mish, Vol IB, pp 184, 186, 187; Johnson, Vol VA, pp 842, 843, 854; Jaksa, Vol IVA, pp 727-728; Vrugink, Vol VIIA, pp 1150-1152, 1159-1161; Int Ex A, Tab M, ¶18.

37. The percentage of time any given student receives

Shared Time instruction is a very small portion of that student's total educational experience, as evidenced by the testimony of Sister Mish at IHM to the effect that less than 10% of a given student's time would be spent in Shared Time instruction.

*Reference:* Mish, Vol IB, p 183; Wagner, Vol IIIB, pp 583-584; Johnson, Vol VA, pp 848-849.

38. Typically, Shared Time courses do not meet on a daily basis. Also, not all part-time public school students participate in every Shared Time course offering.

*Reference:* Mish, Vol IB, pp 181-182, 185; Johnson, Vol VA, pp 848-849; Wagner, Vol IIIB, pp 583-584.

39. In the 1981-1982 school year, students attending 45 nonpublic schools receive the educational benefits conferred by the operation of the Shared Time program.

*Reference:* Plaintiff's Ex 90, Answer 74; GRPS Ex JJ.

40. All of the course offerings made available to part-time public school students through the Shared Time program are likewise made available to full-time public school students in the city of Grand Rapids.

*Reference:* Chicewicz, Vol IIA, p 317; Vrugink, Vol VIA, pp 985-987; Vrugink, Vol VIA, p 1032.

41. No one nonpublic school is favored in the Shared Time and Community Education programs. All nonpublic schools have the opportunity to have their students participate in the programs.

*Reference:* Vrugink, Vol VIIA, pp 1161-1162.

42. There is no planned or anticipated expansion of the types of course offerings made available to students through the Shared Time program.

*Reference:* Pojeski, Vol VA, p 987; Vrugink, Vol VIIA, p 1104.

# **1. Math**

43. The subject area supervisor for the GRPS Shared Time math program is Mr. William Oosse, assisted by Ms. Elsa Geskus.

*Reference:* GRPS Ex J, ¶¶1, 14; GRPS Ex HH.

44. In his capacity as subject area supervisor, Mr. Oosse is responsible for supervising the K through 12th mathematics program which includes responsibility for leading curriculum meetings, teacher in-service training sessions, staff evaluations, staff school assignments, and the orientation of Shared Time math instructors.

*Reference:* GRPS Ex J, ¶¶13, 16.

45. The math curriculum for the GRPS, including Shared Time mathematics, is discussed in detail in the Mathematics Performance Objectives (kindergarten through 6th grade) and the Mathematics Performance Objectives (grades 7 and 8).

*Reference:* GRPS Ex BBB.

46. Remedial mathematics on the elementary level provides students who are considerably behind their grade level with concentrated work in basic skills. Small groups of students are selected by the GRPS teachers to work on such things as addition, subtraction, multiplication or division. These groups generally meet once or more per week. It is anticipated that such remediation work will assist the students to more successfully participate in their regular math curriculum.

*Reference:* GRPS Ex J, ¶17; GRPS Ex L, ¶11; Int Ex A, Tab D, ¶¶4, 5.

47. The primary difference between remedial mathematics and core curriculum mathematics is that the former, in small group sessions, focuses more on the diagnostic evaluation of specific math deficits and the prescription of a course of study specifically designed to correct such deficits for individual students.

*Reference:* Vrugink, Vol VIIa, pp 1152-1153.

48. The objectives of the remedial mathematics program are spelled out in detail in the GRPS Mathematics Objectives booklets.

*Reference:* GRPS Ex J, ¶17; GRPS Ex BBB.

49. Enrichment mathematics provides talented students with advanced work not otherwise available in their core curriculum.

*Reference:* GRPS Ex J, ¶17.

50. The objectives in the enrichment portion of the math program are established by the Shared Time teacher and the GRPS math coordinator in order to meet the educational needs of identified and eligible students.

*Reference:* GRPS Ex J, ¶17.

51. The specific aim of the Shared Time mathematics program is to identify and meet the educational needs of eligible children who can benefit from the types of instruction made available through the program. This objective is achieved in part by focusing on low pupil/teachers ratio (math specialist), as well as the provision of additional concentration on basic skill objectives.

*Reference:* GRPS Ex J, ¶17.

52. The Shared Time mathematics program is designed and



intended to benefit children by providing supplementary, secular, noncore math instruction by math specialists.

*Reference:* GRPS Ex J, ¶17; GRPS Ex K, ¶11.

53. On the high school level, the Shared Time instructional program provides a course in math topics for eligible students.

*Reference:* GRPS Ex M, ¶9.

54. The ninth grade math topics course focuses upon such things as positives and negatives, fractions and decimals, pre-Algebra (basic equation operations), ratios and proportions and percents. The tenth grade program focuses upon consumer math involving study in the following areas: the use of a calculator, banking matters (i.e., checking accounts, savings accounts, interest, loans, etc.), geometry, and the metric system.

*Reference:* GRPS Ex M, ¶9.

55. Math topics is a course in remedial mathematics for secondary students.

*Reference:* GRPS Ex M, ¶9; Chesle, Vol IIA, pp 252, 263, 264.

56. The math topics program is specifically designed to assist students who are not able to function successfully in the core math curriculum provided on the secondary level.

*Reference:* Chesle, Vol IIA, p 264.

57. As was true on the elementary level, secondary level remedial mathematics focuses on small groups and concentrates on individual needs.

*Reference:* Chesle, Vol IIA, p 263.

58. On the secondary level, the nonpublic schools whose students now participate in the math topics program did not have, as part of their core curriculum, a math topics course similar to the type of instruction now available through the GRPS.

*Reference:* Chesle, Vol IIA, pp 259-260, 264; Hollern, Vol IIIB, p 620.

59. The curriculum utilized for the math topics program is the same as that utilized by the GRPS in all of the public school high schools.

*Reference:* Chesle, Vol IIA, p 62, 274.

60. On the elementary level, none of the nonpublic schools who have students participating in the Shared Time program ever provided remedial or enrichment mathematics similar to the type of instruction now available through the GRPS.

*Reference:* Mish Vol IB, p 179; Dwyer, Vol IVA, p 687; see also citations, ¶¶34, 35, *supra*.

61. The Shared Time math program provided by the GRPS is not required by the state of Michigan either as a course offering or as a prerequisite for graduation.

*Reference:* Vrugink, Vol VIIA, p 1152; see also citations, ¶36, *supra*.

62. There are presently 20 nonpublic schools which have students participating in the math offerings made available through the GRPS Shared Time program.

*Reference:* Young, Vol VIIIA, p 1323.

63. There are 2,167 part-time GRPS students who presently benefit from the operation of the Shared Time math program.

*Reference:* GRPS Ex GG.



64. There are 17 teachers now employed by the GRPS providing instruction in the Shared Time math program.

*Reference:* GRPS Ex HH.

65. Religion has nothing to do with the providing of math services.

*Reference:* GRPS Ex M, ¶15.

## 2. Reading

66. The supervisor of the reading program is Ms. Elizabeth L. Rowlands (a/k/a Betty Rowlands), who has been responsible for supervising the Shared Time reading program since 1979.

*Reference:* GRPS Ex B, ¶8.

67. In her capacity as subject area supervisor, Ms. Rowlands is responsible for the development of district curriculum, staff assignment, supervision and evaluation, material supply purchases, development of in-service programs for staff, attending staff meetings (see GRPS Ex KK), administering department budget, interviewing and recommending candidates and assisting teachers, principals and parents who are concerned about the special needs of students.

*Reference:* GRPS Ex B, ¶¶7, 10; Rowlands, Vol VIIB, p 1260.

68. The Shared Time reading program is designed to provide support services to students in addition to the core reading instruction provided by nonpublic school classroom teachers. The three types of services provided through the program are based upon the GRPS Reading Performance Objectives (GRPS Ex LL and Ex MM). There are three types of services offered through the Shared Time reading program:

a. *Remedial:* For students reading below grade level, diagnostic tests are administered to ascertain skill deficiencies. Once skill deficiencies are identified, materials are purchased, developed, or borrowed from the Reading Department or Instructional Media Center of the GRPS to assist GRPS teachers in providing specific skill instruction. Students who thereafter make sufficient progress are dismissed from such classes.

b. *Developmental:* This program is designed for students reading on or about grade level who demonstrate difficulty in mastering new concepts/skills or who need more opportunity for instruction/practice to master skills. As above, diagnostic testing is administered by the Shared Time reading specialist to identify areas of need. Once those areas are identified, materials are secured through the channels noted above, and instruction begins.

c. *Enrichment:* This program is designed for students reading above grade level who demonstrate the potential for increased achievement. The objectives are to challenge the excellent reader in such areas as vocabulary study, literature, discussion groups, advanced study skills, newspaper/magazine reading, and library/reference work skills. Units of study are developed and/or commercial materials are secured by the GRPS to assist the GRPS specialist in providing enrichment experiences.

*Reference:* GRPS Ex B, ¶14; Rowlands, Vol VIIB, pp 1259-1260; GRPS Ex C, ¶7; GRPS Ex D, ¶10; GRPS Ex E, ¶10; see citations, ¶32.

69. The reading program follows the objectives of the GRPS and uses a wide variety of supplementary materials found in the public schools to accomplish those objectives.

*Reference:* GRPS Ex B, ¶15.

70. The entire reading program is designed to benefit students and to increase their potential academic success.

*Reference:* GRPS Ex B, ¶18; GRPS Ex E, ¶10.

71. Presently, students in attendance at 25 nonpublic schools receive Shared Time reading instruction.

*Reference:* GRPS Ex B, ¶10; Young, Vol VIIIA, p 1323.

72. There are presently 4,280 part-time GRPS students receiving the benefits conferred as a result of the operation of the Shared Time reading program.

*Reference:* GRPS Ex GG.

73. The GRPS employs 31 specialists who spend at least a portion of their time providing reading services through the Shared Time reading program.

*Reference:* GRPS Ex HH.

74. All full-time reading specialists are assigned to a number of different schools, both leased premises and other GRPS sites.

*Reference:* GRPS Ex C, ¶1; GRPS Ex E, ¶1; GRPS Ex F, ¶1; GRPS Ex G, ¶1; GRPS Ex I, ¶1.

75. Reading specialists are periodically reassigned on a rotating basis to different school sites by the reading supervisor, Ms. Betty Rowlands.

*Reference:* Barth, Vol VIIB, p 1223.

76. The reading services provided through the GRPS are provided over and above the core curriculum in reading provided by the nonpublic school classroom teachers, and are thus supplementary.

*Reference:* Kroon, Vol VIIB, p 1206; GRPS Ex C, ¶12; GRPS Ex D, ¶10; GRPS Ex E, ¶10; GRPS Ex I, ¶11; and see citations, ¶32.

77. The nonpublic schools which now have students participating in the Shared Time program did not provide remedial, developmental or enrichment reading services prior to the secular, educational services made available through the GRPS.

*Reference:* Mish Vol IB, pp 179-180; Dwyer, Vol IVA, p 687; and see citations, ¶34.

78. The primary difference between a remedial reading program and a core reading program is that a remedial program, in small groups or on an individual basis, focuses upon the diagnosis of specific reading deficiencies, and the prescription of a specified course of instruction to correct those deficiencies. Unlike the sequential instruction involved in the core curriculum, the diagnostic and prescriptive aspects of the remedial program focus upon individual needs, and the most effective means which can be used to meet those needs.

*Reference:* Vruggink, Vol VIIA, pp 1151-1152.

79. Remedial, developmental and/or enrichment reading are not required for graduation from any school, nor are they required by the state of Michigan to be offered by any school.

*Reference:* Vruggink, Vol VIIA, p 1151.

80. Religion has nothing to do with the providing of reading services.

*Reference:* Rowlands, Vol VIIB, pp 1267-1269.

81. The GRPS specialists involved in the Shared Time reading program are encouraged to interact with nonpublic school classroom teachers in order to provide the most effective

support services possible, to assist students in either overcoming reading difficulties, or in benefiting the most from the enrichment opportunities made available through the public schools.

*Reference:* Rowlands, Vol VIIB, pp 1265-1266, 1270.

82. The curriculum and materials which are used in the Shared Time program are those which are used in the other public schools of the district.

*Reference:* Barth, Vol VIIB, p 1226.

### 3. Music

83. The subject area supervisor for the GRPS music program is Mr. Doug Reahm.

*Reference:* GRPS Ex HH; GRPS Ex Y, ¶1.

84. In that capacity, Mr. Reahm is responsible for the preparation and administration of the Music Department Budget; the purchasing of supplies and materials; the interviewing of prospective staff; teacher evaluation, supervision and assignment; and the arrangements for staff in-service training sessions.

*Reference:* GRPS Ex Y, ¶3.

85. The purpose of the Shared Time music program is to give students a broad, general background in the discipline and the art of music. Study of singing, musical instruments, listening, music reading and movement activities are an integral part of the program at the elementary level. The secondary level program in junior high is aimed at a continuation of the general music program and also may include some performance groups. The senior high program is essentially a music performance oriented program.

*Reference:* GRPS Ex Y, ¶12; GRPS Ex Z, ¶16.

86. The music program for grades kindergarten through 12th focuses on vocal, as opposed to instrumental music. The elementary program is prescribed by a set of elementary objectives which were adopted in June of 1979 and which are made available to each music specialist participating in the program. (See GRPS Exhibit QQ.) In the secondary program, the Board is in the process of developing objectives and has prepared a preliminary draft which has been in the hands of all music specialists since the Fall of 1980. (See GRPS Exhibit RR.)

*Reference:* GRPS Ex Y, ¶¶10-11.

87. There are students attending 26 nonpublic schools presently participating in the Shared Time music program.

*Reference:* Young, Vol VIIIA, p 1323.

88. There are presently 4,222 part-time GRPS students who receive and benefit from the educational services made available through the Shared Time music program.

*Reference:* GRPS Ex GG.

89. The GRPS employ 12 music specialists who spend at least a portion of their time providing teaching services in the GRPS Shared Time music program.

*Reference:* GRPS Ex HH.

90. All music specialists are assigned to a number of different schools, both leased premises and other GRPS sites.

*Reference:* GRPS Ex Z, ¶7; GRPS Ex AA, ¶8.

91. The nonpublic schools which have children attending the Shared Time music program did not have, in many in-



stances, a music program prior to the initiation of the program made available through the GRPS.

*Reference:* Mish Vol IB, p 180; Dwyer, Vol IVA, p 689; GRPS Ex Y, ¶12; Int Ex A, Tab K, ¶9; Schedule A, ¶5.

92. Where nonpublic schools did provide some type of music instruction, such instruction was generally provided by the classroom teacher on a sporadic basis. In contrast, the instruction provided by the GRPS is taught by a music specialist, utilizing a unit-by-unit, sequential curriculum in music.

*Reference:* Dwyer, Vol IVA, p 687; GRPS Ex QQ; GRPS Ex RR; Int Ex A, Tab B, ¶¶6, 7; Int Ex A, Tab N, ¶9.

93. The state of Michigan neither requires music as a prerequisite for graduation from any school, nor does it require any school to offer music.

*Reference:* Vrugink, Vol VIIA, p 1150.

94. The music curriculum taught in the Shared Time program does not in any way differ from the curriculum taught at other public school sites. The content of what is taught and the materials and supplies used to provide such services are identical in either setting.

*Reference:* GRPS Ex Y, ¶¶13-14; GRPS Ex Z, ¶16; GRPS Ex AA, ¶13.

#### 4. Art

95. The GRPS Art supervisor is Ms. Vee Matusko.

*Reference:* GRPS Ex BB, ¶1; GRPS Ex GG.

96. As supervisor, Ms. Matusko is responsible for administering the Art Department budget; assignment supervision and evaluation of the art teaching staff; developing and

presenting in-service/workshops for the teaching staff; interviewing and recommending art candidates for available positions; and developing and refining the GRPS art curriculum.

*Reference:* GRPS Ex BB, ¶7.

97. The curriculum provided in the art program is summarized in detail in Exhibits TT and SS.

*Reference:* GRPS Ex TT; GRPS Ex SS.

98. The purpose of the art program is to provide an opportunity for a "total education", one which enables children to experiment with their own individuality and creativity.

*Reference:* GRPS Ex BB, ¶18.

99. The art program is designed to benefit students.

*Reference:* GRPS Ex BB, ¶20.

100. In the words of teacher Strand, "My function, as I perceive it in teaching art to public school students or any students, is to keep children's curiosity and imagination alive. As much as I can I try to keep alive that part of their brain which is normally dulled by the learning-answer stuff. Also I try to teach them to look and see, to feel better about themselves and their individual awareness, to feel good about themselves and that they can make something out of themselves. I try to teach them to respect each other's creativity. I am teaching them to appreciate the beauty in the world."

*Reference:* GRPS Ex CC, ¶15.

101. The Shared Time art program follows the GRPS art curriculum. In terms of course content and the materials/supplies which are used in the provision of such art services, there is no difference between the art instruction provided in Shared Time classrooms and in other public school classes.

*Reference:* GRPS Ex BB, ¶¶9, 19; GRPS Ex LL, ¶16; GRPS Ex DD, ¶10.

102. There are students attending 28 nonpublic schools presently participating in the art program provided through the GRPS.

*Reference:* Young, Vol VIIIA, p 1323.

103. The GRPS employ 16 art specialists who spend at least a portion of their time providing educational services to children on leased premises.

*Reference:* GRPS Ex HH.

104. All art specialists are assigned to a number of different schools, both on leased premises and other GRPS sites.

*Reference:* GRPS Ex CC, ¶1; GRPS Ex DD, ¶1.

105. In the 1981-1982 school year, there are 5,101 part-time GRPS students who are receiving art instruction through the GRPS Shared Time art program.

*Reference:* GRPS Ex GG.

106. Although some of the nonpublic schools in the city may have provided "art instruction", such instruction was generally provided by the classroom teacher on a sporadic basis. In contrast, the instruction which is provided by a GRPS art specialist utilizes a sequential, unit-by-unit course of study in the field of art.

*Reference:* Mish Vol IB, p 180; Dwyer Vol IVA, p 687; Johnson, Vol VA, p 829; GRPS Ex TT; GRPS Ex SS; Int Ex A, Tab K, ¶9; Schedule A, ¶3.

107. The state of Michigan neither requires art as a pre-

requisite for graduation from any school, nor does it require any school to offer art.

*Reference:* Vrugink, Vol VIIA, p 1151.

## 5. Physical Education

108. Joe Leonardo and Arlene Wagner are the subject area supervisors (Assistant Directors of Athletics and Physical Education) for the GRPS Physical Education program.

*Reference:* Mirandette, Vol VIIIA, p 1304; GRPS Ex Q, ¶1; Leonardo, Vol VIA, p 1038.

109. The subject area supervisors in the Physical Education Department are responsible for the development and operation of the physical education curriculum; the assignment, supervision and evaluation of teaching staff; developing and presenting in-service training programs for staff; interviewing and recommending candidates for available positions; and developing and refining the physical education curriculum of the district.

*Reference:* GRPS Ex Q, ¶¶7, 8.

110. The purpose of the GRPS physical education program is to provide a multi-faceted service to children. The public school curriculum for the physical education program is described in detail in the Elementary Physical Education Curriculum guide (GRPS Exhibit PP) and the Senior High School Physical Education Minimal Performance Objectives and Instructional Units (GRPS Exhibit OO).

*Reference:* GRPS Ex Q, ¶14.

111. The philosophy of the GRPS with regard to the physical education offerings of the Shared Time program is that physical education represents a part of the educational process

which enhances the psychological, intellectual and social, as well as physical development of the individual in our society.

*Reference:* GRPS Ex Q, ¶15; GRPS Ex R, ¶9.

112. On the lower elementary level, the instruction provided through the Shared Time program focuses upon body awareness, body mechanics, spatial awareness, gross motor and locomotor skills, and self-testing rhythm activities. In the second and third grade, those concepts are expanded and initial instruction is provided regarding basic sport skills. From grade 4 on, there is a progression of instruction concerning sport skills and knowledge appropriate for each grade level, which eventually leads to sport instruction, i.e., football, soccer, volleyball, basketball, etc. There is a considerable emphasis placed on rhythms and physical fitness activities.

*Reference:* GRPS Ex F, ¶11; GRPS Ex PP; GRPS Ex OO; GRPS Ex Q, ¶16.

113. The curriculum provided in the Shared Time physical education program is that of the GRPS. Shared Time specialists provide the same instruction whether teaching on leased premises or at other public school sites.

*Reference:* GRPS Ex Q, ¶14; GRPS Ex R, ¶11; GRPS Ex S, ¶10; GRPS Ex T, ¶¶7, 25; GRPS Ex U, ¶12; GRPS Ex W, ¶12.

114. There are presently 8,885 part-time GRPS students receiving benefits as a result of the operation of the Shared Time physical education program.

*Reference:* GRPS Ex GG.

115. There are students attending 33 nonpublic schools presently participating in the physical education portion of the Shared Time program.

*Reference:* Young, Vol VIIIA, p 1323.

116. The GRPS employ 31 specialists who spend at least a portion of their time providing teaching instruction in the Shared Time physical education program.

*Reference:* GRPS Ex HH.

117. All physical education specialists have a number of different schools to which they have been assigned, both on leased premises and other public school sites.

*Reference:* GRPS Ex R, ¶1; GRPS Ex S, ¶1; GRPS Ex T, ¶1; GRPS Ex U, ¶1.

118. On the elementary level, many of the nonpublic schools with children now participating in the program never had a physical education program.

*Reference:* Mish Vol IB, p 180; Mirandette, Vol VIIIA, pp 1306, 1313, 1314; Int Ex A, Tab B, ¶¶6, 7; Int Ex A, Tab K, ¶9; Schedule A, ¶4; GRPS Ex U, ¶12.

119. In other nonpublic elementary schools, if teaching instruction was provided in the physical education area, such instruction was provided by the classroom teacher on a sporadic basis. In contrast, the GRPS provides a unit-by-unit, sequential curriculum in the field of physical education.

*Reference:* Dwyer, Vol IVA, p 687; Johnson, Vol VA, pp 827-828, 844; Int Ex A, Tab K, ¶9; Schedule A, ¶4; Int Ex A, Tab L, ¶3; Int Ex A, Tab M, ¶9.

120. The legislature has not required a course in physical education as a condition for graduation from any school.

*Reference:* Vrugink, Vol VIIA, p 1150.

121. Religion has nothing to do with the provision of physical education instruction.

*Reference:* GRPS Ex R, ¶21; GRPS Ex S, ¶12.



## 6. Industrial Arts

122. The GRPS Industrial Arts program is supervised by Mr. Barry Boyer. His responsibilities include supervising and evaluating the three Shared Time, industrial arts teachers.

*Reference:* GRPS Ex HH.

123. Industrial arts is a GRPS program provided on the secondary level in all GRPS high schools and on leased premises in two nonpublic high schools (West Catholic and Christian High). 322 part-time GRPS students receive industrial arts instruction through the Shared Time program.

*Reference:* GRPS Ex GG; Plaintiffs' Ex 90, Answer 79.

124. The curriculum provided through the GRPS industrial arts Shared Time program is substantively different from that provided previously by the nonpublic schools.

*Reference:* Visser, Vol VA, p 873.

125. The instruction provided through the industrial arts program is noncore.

*Reference:* Vruggink, Vol VIIA, pp 1106-1107.

126. Industrial arts is not required for graduation. It represents an elective course which students may take, should they wish to do so.

*Reference:* Visser, Vol VA, p 877.

## D. Location

127. All of the instruction still in issue provided by the GRPS through the Shared Time (during regular school day) and Community Education (before/after school) programs takes place in classrooms which are leased by the GRPS.

*Reference:* Mish, Vol IA, p 48; Chesle, Vol IIA, pp 253,

266; Gritter, Vol IIIA, p 460; Dwyer, Vol IVA, p 677; Jaksa, Vol IVA, p 732; Vruggink, Vol VB, p 921; GRPS Ex HHH; Sandee, Vol IB, p 243; Cichewicz, Vol IIA, p 301; Wagner, Vol IIIA, pp 525, 534, 537-540, 559; Hollern, Vol IIIA, p 618; Penny, Vol IVB, p 791; Kroon, Vol VIIB, p 1205; Mirandette, Vol VIIIA, p 1312; Young, Vol VIIIA, pp 1353, 1366, 1367; Farr Stipulation on record, Vol VIIIA, p 1368; GRPS Ex B, ¶¶13, 24; GRPS Ex C, ¶¶9, 10; GRPS Ex D, ¶8; GRPS Ex E, ¶9; GRPS Ex F, ¶9; GRPS Ex I, ¶10; GRPS Ex J, ¶28; GRPS Ex K, ¶16; GRPS Ex M, ¶8; GRPS Ex N, ¶¶9, 10; GRPS Ex Q, ¶22; GRPS Ex R, ¶26; GRPS Ex S, ¶¶7, 8, 15; GRPS Ex T, ¶18; GRPS Ex U, ¶14; GRPS Ex W, ¶¶10, 14; GRPS Ex Y, ¶21; GRPS Ex Z, ¶10; GRPS Ex AA, ¶16; GRPS Ex BB, ¶¶11, 16; GRPS Ex DD, ¶17; Int Ex A, Tab B, ¶5; Int Ex A, Tab C, ¶13; Int Ex A, Tab D, ¶7; Int Ex A, Tab G, ¶13; Int Ex A, Tab M, ¶4; Int Ex A, Tab N, ¶3; Stipulations, Vol IA, p 47.

128. This year (i.e., 1981-1982) the GRPS paid in excess of \$200,000 in rent for such leased facilities.

*Reference:* Vruggink, Vol VB, p 920.

129. During such instruction, leased rooms are public school classrooms under the jurisdiction and control of the GRPS.

*Reference:* Mish, Vol IB, p 147; Gritter, Vol IIIA, p 458; Dwyer, Vol IVA, p 677; Int Ex A, Tab B, ¶5; Int Ex A, Tab C, ¶13; Int Ex A, Tab G, ¶13; Int Ex A, Tab M, ¶14; Int Ex A, Tab N, ¶13; GRPS Ex B, ¶24; GRPS Ex E, ¶9; GRPS Ex J, ¶28; GRPS Ex Q, ¶22; GRPS Ex S, ¶7; GRPS Ex T, ¶18; GRPS Ex U, ¶8.

130. Except for the six Christian schools for which one lease was executed, all of the remaining nonpublic schools have executed separate leases, in the same form as that identified as GRPS Exhibit HHH.

*Reference:* Gritter, Vol IIIA, p 456; Mish, Vol IA, pp 42-43; (Statement by Attorney Farr); Wagner, Vol IIIA, p 523.

131. At the present time the Board pays \$6.00 per class per week for elementary classroom space and \$10.00 per class per week for secondary classroom space.

*Reference:* Vruggink, Vol VB, p 920; Vruggink, Vol VIIB, p 1171.

132. The \$6.00 per class per week and the \$10.00 per class per week figures were chosen after a study of the costs and expenses which the public schools incur in their own buildings. The rental charges are fair and reasonably related to the actual costs of operation.

*Reference:* Vruggink, Vol VIIB, p 1171.

133. Rooms which are leased by the GRPS are clearly designated as such by the posting of an appropriate sign. A copy of the sign can be found by making reference to GRPS Exhibit EEE.

*Reference:* GRPS Ex EEE; Chesle, Vol IIA, p 274; Gritter, Vol IIIA, p 460; Hollern Vol IIIB, p 618; Dwyer, Vol IVA, p 677; Dwyer Vol IVA, p 685; Dwyer, Vol IVA, p 690; Penny, Vol IVB, p 791; Barth, Vol VIIB, p 1240; Mirandette, Vol VIIIA, p 1312; GRPS Ex C, ¶10; GRPS Ex K, ¶16; GRPS Ex S, ¶15; GRPS Ex W, ¶10; GRPS Ex Z, ¶10; GRPS Ex AA, ¶16; GRPS Ex DD, ¶17.

134. The rooms which are leased by the GRPS for Shared Time purposes are free of religious symbols, artifacts, or anything else of a religious nature.

*Reference:* Mish, Vol IA, p 51; Chesle, Vol IIA, p 266; Penny, Vol IVB, p 792; Prong, Vol VIIB, p 1250; GRPS

Ex B, ¶24; GRPS Ex C, ¶10; GRPS Ex F, ¶¶13, 14; GRPS Ex G, ¶11; GRPS Ex J, ¶28; GRPS Ex W, ¶13; GRPS Ex Q, ¶22; GRPS Ex R, ¶25; GRPS Ex T, ¶¶9, 19; GRPS Ex U, ¶23; GRPS Ex Y, ¶21; GRPS Ex Z, ¶10; GRPS Ex AA, ¶17; Int Ex A, Tab C, ¶13; Int Ex A, Tab D, ¶7; Int Ex A, Tab E, ¶5; Int Ex A, Tab G, ¶13; Int Ex A, Tab H, ¶10.

135. The Shared Time program is provided onsite (i.e., leased premises) because (1) there is less cost if the program is offered at that location; (2) it is the philosophy of the GRPS school district to bring services to children, wherever they are; and (3) studies in the educational field on the issue of "time on task" have consistently concluded that onsite instruction, from an educational point of view, is far superior to offsite instruction.

*Reference:* GRPS Ex C, ¶15; GRPS Ex D, ¶13.

136. All teachers and administrators involved in the Shared Time program, as well as those not involved in the program, expressed the opinion generally that from an educational point of view, the most effective means of providing educational services is to provide such services onsite.

*Reference:* Mish, Vol IA, p 79; Mish, Vol IB, pp 159-160; Jaksa, Vol IVA, p 730; Vruggink, Vol VIA, pp 990-991; Vruggink, Vol VIIA, pp 1098-1099; GRPS Ex E, ¶14; GRPS Ex F, ¶21; GRPS Ex G, ¶18; GRPS Ex K, ¶13; GRPS Ex L, ¶16; GRPS Ex N, ¶12; GRPS Ex R, ¶16; GRPS Ex V, ¶16; GRPS Ex W, ¶19; GRPS Ex Z, ¶17; GRPS Ex AA, ¶15; GRPS Ex CC, ¶14; GRPS Ex DD, ¶16; Young, Vol VIIA, pp 1353, 1354; Int Ex A, Tab C, ¶15.

137. Although offsite instruction is available in some circumstances in the GRPS, such instruction is limited to those situations which require either a special facility or special equipment necessitating the utilization of offsite settings.



*Reference:* Vrugink, Vol VIA, p 1021; Wagner, Vol IIIB, p 553.

#### E. Students

138. The Shared Time program presently provides educational opportunities for somewhere between 10,000 and 11,000 children. These part-time GRPS students are the beneficiaries of the operation of the Shared Time program.

*Reference:* Vrugink, Vol VIIA, p 1121; GRPS Ex GG.

139. The classes which are conducted through the Shared Time program are open to all students, regardless of such students' school of primary attendance.

*Reference:* Gritter, Vol IIIA, p 462; Vrugink, Vol VB, p 925.

140. There have been instances in which students from other school buildings have attended Shared Time offerings on leased premises. For example, there have been students outside of the Christian High student body who have attended Shared Time classes held at Christian High on leased premises. There is no evidence in the record that any student desirous of attending a Shared Time class on leased premises was ever denied admission.

*Reference:* Gritter, Vol IIIA, p 453; Visser, Vol VA, pp 865-866.

141. Public school specialists have the ultimate and final authority as to which students attend Shared Time classes. The nonpublic school administrators do not have any control over that ultimate decision.

*Reference:* Chesle, Vol IIA, p 261; Dwyer, Vol IVA, p 692; Dwyer, Vol IVA, p 732; see also the references for ¶120.

142. Except for those instances in which a Shared Time specialist provides instruction for the entire class, the student selection process generally consists of independent testing by the GRPS of those students recommended or identified by non-public school classroom teachers. Following such testing, a determination is then made by the public school specialist as to whether or not any given child is eligible for and therefore permitted to attend the instructional services being offered by the GRPS.

*Reference:* Barth, Vol VIIB, p 1235; Barth, Vol VIIB, p 1236; Prong, Vol VIIB, p 1245; Barth, Vol VIIB, p 1224; Kroon, Vol VIIB, pp 1200-1202; Chesle, Vol IIA, pp 260-261; GRPS Ex B, ¶17; GRPS Ex C, ¶11; GRPS Ex D, ¶10; GRPS Ex E, ¶17; GRPS Ex F, ¶¶12, 15; GRPS Ex G, ¶¶12, 13; GRPS Ex J, ¶21; GRPS Ex K, ¶11; GRPS Ex L, ¶12; GRPS Ex M, ¶10; GRPS Ex N, ¶11.

143. The residence of a given student is not a factor which is considered in determining student eligibility for Shared Time instruction.

*Reference:* Gritter, Vol IIIA, p 465; Wagner, Vol IIA, p 525; Hollern, Vol IIIB, p 608; Vrugink, Vol VIA, p 1016.

144. Regarding student discipline procedures, the GRPS teachers testified that they either had no such problems, or, if they did, that such problems were handled without involving the nonpublic school administrators.

*Reference:* Penny, Vol IVB, p 795; GRPS Ex E, ¶17; Barth, Vol VIIB, p 1239.

145. If a child is suspended or expelled from his/her non-public school of primary attendance, such suspension or expulsion does not preclude that child from attending Shared Time classes inasmuch as such classes are under the jurisdic-



tion and control of the public schools, and not the nonpublic schools.

*Reference:* Mish, Vol IA, p 108.

146. As a practical matter, usually the students who attend Shared Time classes are otherwise enrolled in the nonpublic schools where the Shared Time instruction takes place on leased premises.

*Reference:* Mish, Vol IA, p 66; Mish, Vol IA, p 84; Zandee, Vol IB, pp 207-208; Chesle, Vol IIA, p 292; Cichewicz, Vol IIA, pp 305-306; Gritter, Vol IIIA, p 461; Hollern, Vol IIIB, p 588; Boss, Vol IVA, p 640; Dwyer, Vol IVA, p 679; Penny, Vol IVB, p 783; Visser, Vol VA, pp 865-866; Kroon, Vol VIIB, p 1214.

#### F. Teachers

147. There are presently 131 full time specialists employed by the GRPS providing teaching services in the Shared Time program, although many of them also spend a portion of their time teaching in the other public schools of the district.

*Reference:* Young, Vol VIIIA, p 1324.

148. Of those 131 contracted teachers, 13 were previously employed by nonpublic schools in the area.

*Reference:* Young, Vol VIIIA, p 1340.

149. Of those 13 teachers previously employed by nonpublic schools, three are presently employed by the GRPS teaching in subject areas different from the subject areas they were teaching in during such prior employment with the nonpublic schools.

*Reference:* Young, Vol VIIIA, p 1340.

150. Over 90% of the teachers presently teaching in the

Shared Time program have never been employed by any nonpublic school whose students are now receiving the benefits conferred by the operation of the Shared Time program.

*Reference:* Young, Vol VIIIA, p 1340.

151. At least one teacher indicated that the reason for switching from the nonpublic school system to the public school system was the fact that the salaries are higher in the public school system.

*Reference:* Chesle, Vol IIA, p 293.

152. In another instance (Mr. Visser), the Shared Time instructor, though previously employed by the nonpublic schools, was also previously employed by the GRPS on a part-time basis for 18 years.

*Reference:* Visser, Vol VA, pp 859-860.

153. Others, now employed by the public schools, have had their applications on file for many years prior to obtaining employment with the public schools.

*Reference:* Chesle, Vol IIA, pp 259, 269.

154. Shared Time teachers, as public school employees, are required to attend subject area in-service training programs and staff meetings, all of which are sponsored and held by the GRPS subject area supervisors.

*Reference:* Chesle, Vol IIA, pp 275, 286-287; Rowlands, Vol VIIB, p 1260; GRPS Ex KK.

155. Such meetings not only serve the function of keeping the teaching staff abreast of recent educational developments and opportunities, but also serve to provide a forum within which to reinforce orientation instructions regarding the rules which apply to the operation of the Shared Time

program, and to "discuss" administrative problems and the like.

*Reference:* GRPS Ex B, ¶11; GRPS Ex KK; GRPS Ex J, ¶¶10, 13, 23; GRPS Ex Q, ¶¶7, 8, 12; GRPS Ex Y, ¶8; GRPS Ex BB, ¶7.

156. In addition, all of the instructors in the Shared Time program are subject to the PEP evaluation program which is utilized by the public schools in evaluating the performance of teachers of the district, in terms of course content and teaching methodology. The same evaluation program is used with respect to all public school employees. The PEP process essentially involves classroom observation followed by the preparation of a formal written evaluation which ultimately ends up in the teacher's personnel file. Teachers are evaluated each year during their probation (i.e., first two years), and once every three years after having attained tenure. The nonpublic school administrators and teachers have no input or control over that process.

*Reference:* Chesle, Vol IIA, pp 265, 269-271, 289; Prong, Vol VIIB, p 1248; Rowlands, Vol VIIB, pp 1260, 1261-1263, 1274; Mirandette, Vol VIIIA, p 1304; GRPS Ex B, ¶9; GRPS Ex C, ¶16; GRPS Ex D, ¶15; GRPS Ex F, ¶23; GRPS Ex G, ¶¶10, 16; GRPS Ex I, ¶16; GRPS Ex J, ¶¶22, 24; GRPS Ex K, ¶15; GRPS Ex L, ¶18; GRPS Ex M, ¶14; GRPS Ex Q, ¶18; GRPS Ex S, ¶¶8, 13; GRPS Ex W, ¶¶11, 20; GRPS Ex T, ¶¶8, 11, 13; GRPS Ex AA, ¶12; GRPS Ex XX, ¶17; GRPS Ex BB, ¶¶14, 21; Int Ex A, Tab C, ¶13; Int Ex A, Tab G, ¶13; Int Ex A, Tab M, ¶16.

157. The public schools, as part of the teacher evaluation process, do not specifically monitor Shared Time instruction for religious content.

*Reference:* Zandee, Vol IB, p 241; Jaksa, Vol IVA, p 714; Rowlands, Vol VIIB, p 1274.

158. In those instances in which parents have requested parent/teacher conferences, Shared Time teachers have made arrangements directly with parents for such purposes. Non-public school administrators are not involved in that process.

*Reference:* Barth, Vol VIIB, p 1241; Mish, Vol IA, p 112.

159. Shared Time teachers do not teach religion. The topic of religion is not included in the GRPS curriculum.

*Reference:* Zandee, Vol IB, p 238; Chesle, Vol IIA, p 267; Kroon, Vol VIIB, p 1215; GRPS Ex E, ¶17; GRPS Ex U, ¶¶21, 25; Penny, Vol IVB, pp 795-797.

160. All of the Shared Time personnel have stated that they have never felt any religious pressure or influence being exerted by the nonpublic school administrators and/or teachers to encourage them to incorporate religious matters into the GRPS subject matter they teach or supervise.

*Reference:* Chesle, Vol IIA, p 267; Wagner, Vol IIIB, pp 558, 559; Kroon, Vol VIIB, p 1207; Prong, Vol VIIB, p 1245; Mirandette, Vol VIIIA, p 1307; GRPS Ex B, ¶¶21, 22, 25; GRPS Ex C, ¶16; GRPS Ex D, ¶16; GRPS Ex E, ¶16; GRPS Ex F, ¶¶23, 24; GRPS Ex G, ¶16; GRPS Ex I, ¶14; GRPS Ex J, ¶¶26, 29; GRPS Ex K, ¶17; GRPS Ex L, ¶21; GRPS Ex N, ¶¶15, 16; GRPS Ex Q, ¶¶19, 20, 23; GRPS Ex R, ¶¶19, 21; GRPS Ex S, ¶16; GRPS Ex T, ¶16; GRPS Ex U, ¶21; GRPS Ex W, ¶22; GRPS Ex Y, ¶19; GRPS Ex Z, ¶15; GRPS Ex AA, ¶20; GRPS Ex BB, ¶22; GRPS Ex CC, ¶18; GRPS Ex DD, ¶¶15, 19.

161. Although some Shared Time teachers acknowledge that there may be something religious about the atmosphere of the Shared Time schools in which they provide their teaching services, the testimony is uncontroverted that any such "atmosphere" has had absolutely no impact or effect upon the content of the courses which are taught, the manner in which



they are taught, or the goals which the Shared Time teachers have for their students, nor does it cause them to introduce religious matter into their classes.

*Reference:* Chesle, Vol IIA, pp 265, 267; Zandee, Vol IB, pp 238, 241; Penny, Vol IVB, p 799; Kroon, Vol VIIB, pp 1206, 1207, 1210, 1215, 1217; Prong, Vol VIIB, pp 1245-1247; Rowlands, Vol VIIB, pp 1266-1269, 1271; Mirandette, Vol VIIIA, p 1307; GRPS Ex B, ¶25; GRPS Ex C, ¶17; GRPS Ex D, ¶¶11, 16; GRPS Ex F, ¶24; GRPS Ex G, ¶¶16, 17; GRPS Ex J, ¶29; GRPS Ex L, ¶¶23, 24; GRPS Ex M, ¶15; GRPS Ex N, ¶¶15, 16; GRPS Ex Q, ¶¶19, 20, 23; GRPS Ex R, ¶24; GRPS Ex S, ¶16; GRPS Ex T, ¶¶17, 21; GRPS Ex U, ¶¶21, 22, 25; GRPS Ex W, ¶¶22, 24, 25; GRPS Ex Y, ¶22; GRPS Ex Z, ¶¶15, 16; GRPS Ex AA, ¶21; GRPS Ex BB, ¶22; GRPS Ex CC, ¶¶18, 19; GRPS Ex DD, ¶¶13, 15, 18, 21.

162. All Shared Time instructors follow the GRPS work calendar.

*Reference:* Penny, Vol IVB, p 790; Chesle, Vol IIA, p 272; GRPS Ex D, ¶9; GRPS Ex T, ¶13; GRPS Ex U, ¶12; GRPS Ex W, ¶¶15, 21; GRPS Ex Z, ¶11; GRPS Ex AA, ¶19; GRPS Ex CC, ¶11.

163. All Shared Time teaching assignments are the responsibility of and made by the subject area supervisors employed by the GRPS. Nonpublic school administrators have no input or control over that process.

*Reference:* Rowlands, Vol VIIB, p 1260; Gritter, Vol IIIA, p 469; Wagner, Vol IIIB, pp 558, 559; Hollern, Vol IIIB, p 617; Boss, Vol IVA, p 651; Jaksa, Vol IVA, p 733; Berends, Vol IVB, p 766; GRPS Ex C, ¶8; GRPS Ex D, ¶15; GRPS Ex E, ¶8; GRPS Ex F, ¶8; GRPS Ex I, ¶9; GRPS Ex L, ¶9; GRPS Ex N, ¶8; GRPS Ex R, ¶10; GRPS

Ex S, ¶6; GRPS Ex W, ¶8; GRPS Ex AA, ¶12; GRPS Ex BB, ¶17; GRPS Ex CC, ¶8; GRPS Ex DD, ¶8; Int Ex A, Tab C, ¶13.

164. GRPS employees are never required to disclose their religious affiliation, nor are they even asked to do so. It is the policy of the district not to make such inquiries of prospective applicants.

*Reference:* Mirandette, Vol VIIIA, p 1303; Bailey, Vol VIIIA, p 1283; Rowlands, Vol VIIB, p 1260; Prong, Vol VIIB, p 1244; Barth, Vol VIIB, p 1223.

165. Each teacher in the Shared Time program has received periodic orientations in which the guidelines for the operation of the program have been explained in detail. (See also Proposed Finding of Fact #167.)

*Reference:* Young, Vol VIIIA, p 1322; GRPS Ex B, ¶13; GRPS Ex C, ¶9; GRPS Ex D, ¶18; GRPS Ex E, ¶9; GRPS Ex F, ¶9; GRPS Ex G, ¶9; GRPS Ex I, ¶8; GRPS Ex J, ¶16; GRPS Ex K, ¶10; GRPS Ex L, ¶10; GRPS Ex M, ¶7; GRPS Ex Q, ¶¶10, 11; GRPS Ex S, ¶7; GRPS Ex V, ¶8; GRPS Ex Y, ¶9; GRPS Ex Z, ¶9; GRPS Ex AA, ¶11; GRPS Ex BB, ¶11; GRPS Ex CC, ¶10; GRPS Ex DD, ¶9.

166. In September of 1981, Mr. Young specifically visited the staff meetings of the teachers of the various subject areas to summarize the applicable guidelines. This summary was reduced to writing in a September 3, 1981 memorandum to Dr. Elmer Vrugink, in which Mr. Young stated the following.

"It will be my intent to impart the following information on a continuing basis to the supervisors and instructors of the Shared Time program:



**Basis:** As Grand Rapids Public School employees, we are providing a unique educational service to the community.

1. We are public school employees.
2. We are supervised by public school employees.
3. The subject of religion would never be discussed in any of our public schools classes.
4. We follow the public school curriculum, the private school curriculum has nothing to do with our classes.
5. We follow the public school calendar, we work when public school personnel work irregardless of the private school calendar.
6. The room that we teach in is a public room—it is a public room in a leased public school building.
  - a. Leased card will always be prominently placed in the classroom.
  - b. Religious artifacts will not be displayed in a public school classroom.
  - c. If we find a problem with our classroom we will notify our supervisor or Shared Time directors; not the private school building principal.
7. Course content:
  - a. We provide supplementary, ancillary courses to private school children.
  - b. We do not provide core courses.
  - c. The courses we provide are either remedial or enrichment in nature."

**Reference:** Young, Vol VIIIA, p 1322; GRPS Ex GGG; Kroon, Vol VIIB, pp 1204-1205.

167. Shared Time teachers have been specifically admonished not to incorporate religious matters into the content of the curriculum which they provide.

**Reference:** Zandee, Vol IB, pp 238-239; Chesle, Vol IIA, pp 275-276, 289-290; Penny, Vol IVB, p 795; Rowlands, Vol VIIB, pp 1273-1274.

## G. Operation

### 1. Administration

168. As explained in GRPS Exhibit HH, the Shared Time Director is Mr. John Young, responsible for the administration of the program, budget and planning matters.

**Reference:** GRPS Ex HH; Vrugink, Vol VB, p 922.

169. In terms of the content of the subject matter taught, Dr. Donna Carter is responsible for curriculum and the various subject area supervisors identified in paragraph 172.

**Reference:** GRPS Ex HH.

170. In turn, both Mr. Young and Ms. Carter are directly responsible to Dr. Elmer Vrugink, the Deputy Superintendent.

**Reference:** GRPS Ex HH.

171. In each of the subject areas taught in the Shared Time program, there are subject area supervisors who are responsible for maintaining "quality control" over the type of instruction provided through the GRPS in these areas.

**Reference:** GRPS Ex HH; Vrugink, Vol VB, p 926; Vrugink, Vol VIIA, pp 1108-1110.

172. The subject area supervisors for the 1981-1982 school year are as follows:

Art .....	Vee Matusko
Math .....	William Oosse
Music .....	Douglas Reahm
Physical Education .....	Joe Leonardo Arlene Wagner
Reading .....	Betty Rowlands
Industrial Arts .....	Barry Boyer
Educational Park .....	Dr. Tom Next

*Reference:* GRPS Ex HH.

173. The Director of Shared Time, Mr. John Young, is responsible for the organization and implementation of the administrative aspects of the Shared Time program. At the beginning of each school year, he mails to all the area nonpublic schools a packet of materials outlining the available course offerings through the Shared Time program. Along with such course offerings, the Shared Time office also forwards a summary of the Shared Time Guidelines which outline the rules under which the program is made available to students who otherwise attend nonpublic schools, which guidelines state the following:

- "1. The Shared Time is a Grand Rapids Public School program providing supplemental instruction to meet the educational needs of children.
2. The Shared Time program is a program taught by public school teachers who are hired by, assigned by and, if necessary, fired by the GRPS—nonpublic personnel have absolutely nothing to do with such matters. Shared Time teachers follow GRPS work calendar.
3. Teachers in the Shared Time program are employees of the GRPS, supervised and evaluate by the GRPS

only. Nonpublic personnel have no role whatsoever in the supervision and evaluation process.

4. Due to space considerations, economic considerations, and education-motivated convenience considerations, the Shared Time program is operated and made available in publicly leased classrooms, clearly marked and designated as such. GRPS classrooms are to be provided by the nonpublic schools, stripped of all religious materials or symbols.
5. Teachers in the Shared Time program are required to provide instruction based upon the guides and objectives of the GRPS curriculum. The purpose of the Shared Time program is to provide supplementary, noncore, secular teaching to meet the educational needs of children. The Shared Time curriculum does not and may not parallel the nonpublic school curriculum.
6. All materials, supplies, books, equipment and the like, utilized in providing the Shared Time program must be purchased by or supplied by the GRPS. Such materials/supplies/equipment should be:
  - a. Labeled as GRPS property;
  - b. Stored in locked cabinets or closets when not in use;
  - c. Inventoried regularly;
  - d. Segregated from materials/supplies/equipment of nonpublic;
  - e. Used *only* by public Shared Time teachers.
7. *Students:* All Shared Time students are treated as GRPS students. They are graded, disciplined, etc. as GRPS students."

*Reference:* GRPS Ex LLL; Young, Vol VIIIA, pp 1320-1321.

174. After the nonpublic schools fill out the GRPS forms, they are then returned to Mr. Young's office for further handling. Once the statistical information is compiled concerning the number of schools, courses and estimated students involved, Mr. Young then meets with the GRPS subject area supervisors to discuss staffing needs for the upcoming school year. The subject area supervisors are then responsible for making appropriate staff assignments. Once the number of teachers has been established by that process, Mr. Young then analyzes the facility needs and makes appropriate arrangements with the nonpublic schools for sufficient leased space to carry on the proposed programs.

*Reference:* Young, Vol VIIIA, pp 1320-1321.

175. The decision to opt in or opt out of the Shared Time program lies with the nonpublic school administrators. If they choose to opt in, they must do so subject to the GRPS guidelines.

*Reference:* Vrugink, Vol VB, p 925; Vrugink, Vol VIIA, pp 1161-1162.

## 2. Hiring Procedures

176. The Assistant Superintendent of Personnel is Mr. David Bailey.

*Reference:* GRPS Ex A, ¶1.

177. As Assistant Superintendent of Personnel, Mr. Bailey is primarily responsible for the recruiting and hiring of all school district personnel.

*Reference:* GRPS Ex A, ¶6.

178. In general, the Personnel Department is not involved in the day-to-day operations of the Shared Time program. At the beginning of each school year, the director of Shared Time informs Mr. Bailey regarding the staffing needs of the Shared Time program.

*Reference:* GRPS Ex A, ¶¶7, 8.

179. With respect to full-time, contracted teachers, including Shared Time teachers, the Board has a uniform and consistent hiring procedure.

*Reference:* Bailey, Vol VIIIA, pp 1286-1288; GRPS Ex A, ¶9.

180. When available openings occur, the Director of Personnel, Mr. Richard Carlson, follows this procedure:

- a) He first reviews the "lay-off" list to determine whether there are any eligible individuals who could fill that position (the Master Agreement with the teachers Union mandates this procedure);
- b) If the available position is not filled by that process, Mr. Carlson then reviews the GRPS' list of past interviewees;
- c) If the available position is not filled by that process, Mr. Carlson then reviews the applicant files.

181. After comparing credentials, resources, recommendations and the like, Mr. Carlson makes his recommendation to Mr. Bailey who in turn makes a recommendation to the Board for action. If the Board votes favorably on that recommendation, such individual is then hired to fill the available position.

*Reference:* GRPS Ex A, ¶10.

182. In contrast, when the available position arises in the specialist/consultant area (i.e., physical education, art, music,



reading, math, etc.), the subject area supervisor also becomes involved in the interview and evaluation process.

*Reference:* GRPS Ex A, ¶10; GRPS Ex B, ¶12; GRPS Ex J, ¶15; GRPS Ex Q, ¶9; GRPS Ex Y, ¶8; GRPS Ex BB, ¶10.

183. It is not unusual for the Personnel Department to contact prior employers or other references as part of its hiring process.

*Reference:* Bailey, Vol VIIIA, p 1288.

184. The purpose of the GRPS hiring procedure is to provide GRPS students with the best and most qualified instructors. Excellence is the Board's goal.

*Reference:* GRPS Ex A, ¶12.

185. The Personnel Department is ultimately responsible for the Progressive Evaluation Program (PEP) which is used by the Board to continually review the quality of the education being provided by its teachers.

*Reference:* GRPS Ex A, ¶14.

186. Because the teachers in the Shared Time program are all classified as specialists and/or consultants, the actual evaluation itself is carried out and performed by the subject area supervisors.

*Reference:* GRPS Ex A, ¶14.

187. All of the other personnel policies and procedures of the Board are uniform and consistent, applying with equal force to all teachers, including Shared Time teachers.

*Reference:* GRPS Ex A, ¶17.

### 3. Supplies and Materials

188. All of the supplies, materials and/or equipment that are utilized in the Shared Time program are provided by or through the GRPS.

*Reference:* Zandee, Vol IB, pp 224-225; Chesle, Vol IIA, p 265; Barth, Vol VIIB, p 1226; GRPS Ex B, ¶16; GRPS Ex C, ¶12; GRPS Ex D, ¶14; GRPS Ex E, ¶15; GRPS Ex F, ¶10, 12; GRPS Ex G, ¶15; GRPS Ex I, ¶12; GRPS Ex J, ¶19; GRPS Ex K, ¶14; GRPS Ex L, ¶17; GRPS Ex M, ¶13; GRPS Ex Q, ¶17; GRPS Ex S, ¶10; GRPS Ex T, ¶7; GRPS Ex U, ¶17; GRPS Ex W, ¶12; GRPS Ex Y, ¶13; GRPS Ex AA, ¶16; GRPS Ex BB, ¶19; GRPS Ex CC, ¶16; GRPS Ex DD, ¶10.

189. The Board has a uniform ordering procedure which all teachers, including Shared Time teachers, must use in order to acquire supplies and materials needed to provide their educational services.

*Reference:* Chesle, Vol IIA, p 266.

190. All of the supplies and materials which are provided through the GRPS are stored in such a fashion so that they are isolated from the supplies and materials utilized by non-public classroom teachers in the school buildings in which Shared Time services are offered.

*Reference:* Mish, Vol IA, p 114; Chesle, Vol IIA, p 267; GRPS Ex N, ¶13; GRPS Ex T, ¶16; GRPS Ex R, ¶12; GRPS Ex S, ¶10; GRPS Ex AA, ¶16; GRPS Ex CC, ¶16; GRPS Ex DD, ¶17, 20.

191. Nonpublic school employees do not use or have access to any of the GRPS supplies and materials used in the operation of the Shared Time program.

*Reference:* Chesle, Vol IIA, p 275; Dwyer, Vol IVA, p 693.

192. GRPS supplies/materials/equipment are appropriately labeled as public school property and inventoried regularly.

*Reference:* GRPS Ex R, ¶18; GRPS Ex U, ¶¶17, 20; GRPS Ex Y, ¶13; GRPS Ex AA, ¶16; GRPS Ex CC, ¶16.

#### 4. Grading

193. Grades for those Shared Time classes in which a grade is given are recorded and distributed under a uniform grading procedure which the Board has adopted whereby the grades for all Shared Time instruction are placed on a single public school report card, and mailed out by the Director of Shared Time to the parents of the students participating in the program. The Shared Time teachers do not utilize the report card system of any of the nonpublic schools who have children attending Shared Time classes.

*Reference:* Dwyer, Vol IVA, p 693; Jaksa, Vol IVA, pp 732-733; Penny, Vol IVB, pp 789-790; Barth, Vol VIIB, pp 1238-1239; Rowlands, Vol VIIB, p 1279; GRPS Ex C, ¶14; GRPS Ex D, ¶12; GRPS Ex E, ¶12; GRPS Ex I, ¶115; GRPS Ex K, ¶12; GRPS Ex R, ¶17; GRPS Ex U, ¶15; GRPS Ex W, ¶18; GRPS Ex DD, ¶14.

#### 5. Lack of Entanglement

194. In the day-to-day operation of the Shared Time program, there is no entanglement of the administrative lines of authority which exist between the GRPS supervisors and their Shared Time teachers and the nonpublic school administrators and their teachers. The lines of authority are clear, distinct and separate. The Shared Time program is administered (i.e., controlled) solely by the GRPS.

*Reference:* GRPS Ex N, ¶16; GRPS Ex R, ¶21; GRPS Ex U, ¶26; GRPS Ex CC, ¶20; GRPS Ex DD, ¶19; Int Ex A, Tab C, ¶13; Int Ex A, Tab G, ¶13; Int Ex A, Tab M, ¶6.

195. Teacher Lorrie Strand summed up the situation like this:

"I understand there is a concern on the part of the plaintiff to this lawsuit that due to the fact that public school teachers are going into nonpublic schools the administrative lines of authority are going to become entangled or intermixed. I have never experienced any confusion concerning the lines of authority between me and my supervisor, nor between what authority any principal has over me when I am in their building. In my case, I am responsible for what I teach and how I teach it only to my GRPS supervisor."

*Reference:* GRPS Ex CC, ¶20; see also references to ¶195.

196. There is no danger that religion will or may become intertwined or intermixed in the content of what is taught in the Shared Time program.

*Reference:* GRPS Ex DD, ¶19; GRPS Ex CC, ¶19; GRPS Ex U, ¶25; GRPS Ex R, ¶21.

#### 6. Little Contact With Nonpublics

197. Outside of the initial contacts with nonpublic school administrators/teachers to arrange the Shared Time program scheduling, GRPS teachers and subject area supervisors have very little day-to-day contact with any nonpublic school personnel.

*Reference:* GRPS Ex B, ¶22; GRPS Ex E, ¶16; GRPS Ex I, ¶13; GRPS Ex J, ¶¶26, 27; GRPS Ex N, ¶14; GRPS Ex R, ¶¶13, 14; GRPS Ex T, ¶14; GRPS Ex Y, ¶17; Kroon, Vol VIIB, p 1218; Int Ex A, Tab C, ¶13; Int Ex A, Tab G, ¶13; Int Ex A, Tab M, ¶6.

198. GRPS administrators never inspect or supervise the nonpublic school or its instructional program.

*Reference:* GRPS Ex B, ¶¶22, 23; GRPS Ex Q, ¶¶18, 20, 21; GRPS Ex Y, ¶¶16, 17; Int Ex A, Tab G, ¶13; Int Ex A, Tab M, ¶6

#### H. Availability To Other GRPS Students

199. All other public school students have the same services available to them which are provided in the Shared Time context.

*Reference:* Vruggink, Vol VIIA, p 1145; Vruggink, Vol VIA, pp 985-987; Vruggink, Vol VIA, p 1032; GRPS Ex OOO; GRPS Ex PPP; GRPS Ex QQQ; See citations, ¶41.

#### I. Understanding Of Nonpublic School Administrators

200. The nonpublic school administrators who testified acknowledged receipt of the Shared Time Guidelines (GRPS Exhibit LLL) and the fact that those guidelines simply serve to incorporate in written form the understanding which they have had regarding the operation of the program, since its inception.

*Reference:* Dwyer, Vol IVA, pp 691-692; Jaksa, Vol IVA, p 731; Johnson, Vol VA, p 846.

201. The nonpublic school administrators understand that opting into the program requires that they comply with the guidelines which attach to the operation of the program.

*Reference:* Wagner, Vol IIIB, p 558.

202. Nonpublic school administrators understand that:

- a. The teachers involved in the Shared Time program are GRPS employees.

*Reference:* Mish, Vol IB, p 161; Hollern, Vol IIIB, p 617; Boss, Vol IVA, p 651; Int Ex A, Tab C, ¶13; Int Ex A, Tab G, ¶13; Int Ex A, Tab M, ¶6.

- b. The assignment of Shared Time teachers is the sole responsibility of the GRPS.

*Reference:* Gritter, Vol IIIA, p 469; Boss, Vol IVA, p 651; Jaksa, Vol IVA, p 713; Jaksa, Vol IVA, p 733.

- c. The Shared Time teachers are subject to the formal supervision and evaluation (i.e., control) of the GRPS and that the nonpublic schools have no authority with respect to the conduct of such teachers, nor any input into the supervision and/or evaluation process which is utilized by the public schools.

*Reference:* Mish, Vol IB, p 161; Wagner, Vol IIIB, p 559; Hollern, Vol IIIB, p 617; Boss, Vol IVA, p 652; Jaksa, Vol IVA, p 733.

- d. The curriculum which is utilized in providing services in the Shared Time program is that of the GRPS.

*Reference:* Mish, Vol IB, pp 161-162; Wagner, Vol IIIB, p 559; Hollern, Vol IIIB, p 617.

- e. Rooms leased from the nonpublic schools for Shared Time instruction must be free of all religious symbolism and/or artifacts of any kind.

*Reference:* Wagner, Vol IIIA, p 522; Hollern, Vol IIIB, p 618; Boss, Vol IVA, p 652; Dwyer, Vol IVA, p 690; Jaksa, Vol IVA, p 732; Int Ex A, Tab C, ¶13; Int Ex A, Tab D, ¶7; Int Ex A, Tab E, ¶5; Int Ex A, Tab G, ¶13; Int Ex A, Tab H, ¶10.

203. The students who participate in the Shared Time pro-



gram, while receiving such instruction, are part-time GRPS students.

*Reference:* Wagner, Vol IIIA, p 525.

#### IV. Community Education

##### A. Purpose

204. Consistent with the educational philosophy of the Board, the purpose and intent behind the Community Education program (before and/or after school) is to make available to all students in the Grand Rapids area, the same educational opportunities.

*Reference:* Young, Vol VIIIA, p 1360; GRPS Ex KKK.

205. The Community Education program represents a GRPS program of educational opportunity outside of the regular school day.

*Reference:* Wagner, Vol IIIA, p 504; Boss Vol IVA, p 649; Dwyer, Vol IVA, p 680; Jaksa, Vol IVA, p 712; GRPS Ex KKK.

##### B. Course Offerings

206. The course offerings made available to part-time GRPS students through the Community Education program (before and/or after school) generally consist of enrichment and/or leisure time courses. On the elementary level, all of the course offerings made available are strictly leisure time in nature.

*Reference:* Wagner, Vol IIIA, p 504; Dwyer, Vol IVA, p 679; Vruggink, Vol VIIA, p 1112; GRPS Ex JJJ.

207. A complete list of the courses made available in the

before and after school program for the school year 1981-1982 can be obtained by making reference to GRPS Exhibit JJJ.

*Reference:* GRPS Ex JJJ.

208. On the elementary level, Community Education instruction is generally confined to twelve-week, after school sessions, of shorter duration than the regular semester of any nonpublic school in the district.

*Reference:* Dwyer, Vol IVA, p 686; Vruggink, Vol VIIA, p 1113; Young, Vol VIIIA, p 1329.

209. On the secondary level, the duration of the Community Education program follows the GRPS school calendar.

*Reference:* Young, Vol VIIIA, p 1330.

210. All of the types of instructional offerings made available through the Community Education program are otherwise available to full-time public school students, although not necessarily before and/or after school. Because the course offerings of the public schools are much broader than the offerings of the nonpublic schools, there are many opportunities for full-time GRPS students to take the type of courses available in a Community Education program either during the regular school day, or in the evening. Indeed, Mr. Dilley acknowledged on the record that plaintiffs were not making any claim in this case that courses offered by the GRPS on leased premises are not otherwise available to other GRPS public school students.

*Reference:* Cichewicz, Vol IIA, p 318; Vruggink, Vol VIIA, p 1112; Vruggink, Vol VIA, p 1031; GRPS Ex OOO; GRPS Ex PPP; GRPS Ex QQQ; Dilley, Vol VIIB, pp 1167-1168.

211. None of the nonpublic schools which presently have students attending the Community Education classes otherwise

ever provided such classes to their students. The Community Education classes provided by the GRPS do not serve as a substitute for anything otherwise available at the nonpublic schools which now have students participating in the GRPS Community Education program.

*Reference:* Mish, Vol IB, p 184; Gritter, Vol IIIA, p 442; Hollern, Vol IIIB, p 620; Young, Vol VIIIA, p 1329; See citations, ¶¶34, 35.

212. In explaining the manner in which the Community Education program is set up, Mr. John Young stated that because Community Education represents a program which is completely voluntary, an important factor in setting up a successful program is to find a teacher who is not only interested in teaching, but also one who is known in the community of potential students so that such a teacher can attract such students to his or her class. As a general rule, Community Education classes will only be offered in the event twelve or more students sign up for the class. In setting up a successful program, the arrangements for appropriate teachers is the most critical and important factor. For that reason, in almost every instance where Community Education classes are held, the teacher employed by the district to teach in the Community Education program is also one that teaches during the regular school day in the same building where the Community Education courses are being offered. Once the teacher has been identified, surveys are then conducted to determine students' interests, and if such course offerings are then approved by the Shared Time office, the program is then implemented.

*Reference:* Young, Vol VIIIA, p 1325-1328; Jaksa, Vol IVA, pp 728-729; Jaksa, Vol IVA, p 712; Young, Vol VIIIA, p 1328; Dwyer, Vol IVA, p 681; Mish, Vol IA, p 86; Gritter, Vol IIIA, p 447.

213. The same organizational procedure outlined with respect to the Community Education program applies in the public school building setting as well, as evidenced by the testimony of Mr. Young and that of Mr. Cichewicz, the principal for Stocking Elementary.

*Reference:* Cichewicz, Vol IIA, pp 318-319; Young, Vol VIIIA, pp 1325-1328.

214. None of the course offerings made available through the Community Education program are required by the state of Michigan for graduation purposes, nor are such courses required to be offered by any school.

*Reference:* Vrugink, Vol VIIIA, p 1153; Gritter, Vol IIIA, p 479; Wagner, Vol IIIB, p 534; Wagner, Vol IIIB, p 585; Young, Vol VIIIA, p 1329.

215. Community Education courses do not fulfill nonpublic graduation requirements.

*Reference:* Mish, Vol IB, p 184; Wagner, Vol IIIB, pp 533-534.

#### C. Location

216. See Proposed Findings of Facts under subpart "D" of "III", *supra*, at p 322-323.

#### D. Students

217. Generally speaking, those students who attend Community Education classes at GRPS leased facilities in the nonpublic schools are those students who also attend such nonpublic schools during the regular school day.

*Reference:* Mish, Vol IB, p 145; Gritter, Vol IIIA, p 453; Hollern, Vol IIIB, p 589; Visser, Vol VA, p 868.

218. There are, however, exceptions to that general rule. Situations have arisen in which students attend Community Education classes who are not otherwise enrolled in the non-public school where the Community Education class takes place.

*Reference:* Jaksa, Vol IVA, p 710.

219. The identity of the student body attending Community Education classes on GRPS leased premises does not in any way differ from the identity of the student body attending Community Education classes in other public schools.

*Reference:* Cichewicz, Vol IIA, p 319.

220. There are students attending 64 area schools who are receiving Community Education instruction in the before and/or after school program.

*Reference:* Young, Vol VIIIA, p 1331.

221. On the elementary level, students in 34 public schools and in 27 nonpublic schools are receiving Community Education services through the operation of the Community Education program.

*Reference:* Young, Vol VIIIA, p 1331.

#### E. Teachers

222. There are over 300 part-time teachers employed by the GRPS in the Community Education program.

*Reference:* Young, Vol VIIIA, p 1331.

223. Community Education instructors are hired by the GRPS.

*Reference:* Dwyer, Vol IVA, p 680; Wagner, Vol IIIA, p 504; Bailey, Vol VIIIA, pp 1296-1297; Jaksa, Vol IVA, p 712; Dwyer, Vol IVA, p 681; Hollern, Vol IIIB, p 614.

224. The employment process used in the Community Education program on leased premises is the same process used in the Community Education Department, generally.

*Reference:* Bailey, Vol VIIIA, pp 1296-1297.

225. In the Community Education context, because most of the teachers are hourly employees, the actual hiring procedure is performed by the regional directors of the Community Education Department or, in the case of that portion of the Community Education program provided on leased premises, by community aides under the direction/supervision of John Young, who simply then report the names of such employees (and other pertinent data) to the Personnel Department. Of necessity, because of the nature of the subjects taught and duration of such teacher's employment, the Personnel Department is not as directly involved in the hiring process as it is with respect to full-time, contracted employees.

*Reference:* Bailey, Vol VIIIA, pp 1296-1297.

226. Nonpublic school administrators do not have any input into the hiring decisions made by the GRPS with respect to its Community Education teachers.

*Reference:* Hollern, Vol IIIB, p 614; Gritter, Vol IIIA, p 453.

227. Generally speaking, the teaching staff of the Community Education program on leased premises or other public school sites is otherwise employed during the regular school day as classroom teachers in the same building.

*Reference:* Mish, Vol IA, p 72; Gritter, Vol IIIA, p 445; Wagner, Vol IIIA, p 504; Dwyer, Vol IVA, p 680; Jaksa, Vol IVA, p 708.

228. As noted earlier, such teachers are generally employed



because the success of the program often depends upon not only the interest, but also the identity of the teacher involved.

*Reference:* Young, Vol VIIIA, p 1327.

#### F. Availability To Other Public School Students

229. On the elementary level, the full-time public school students in the city of Grand Rapids have the same opportunities in the Community Education program available to them.

*Reference:* Cichewicz, Vol IIA, p 318; Vruggink, Vol VIA, p 1031; Vruggink, Vol VIIA, pp 1112, 1113.

230. Community Education programs have been available in the public schools on the elementary level for at least the past ten years, dating back to the early 1970's.

*Reference:* Vruggink, Vol VIIA, p 1113.

231. On the secondary level, although there is no before school program, full-time public school students nonetheless have the opportunity to take course offerings comparable to the Community Education program, although such offerings may be available at different times, i.e., during the regular school day and/or at night.

*Reference:* Vruggink, Vol VIIA, pp 1112-1113; Vruggink, Vol VIA, p 1030; GRPS Ex OOO; GRPS Ex PPP; GRPS Ex QQQ; Dilley, Vol VIIB, pp 1167-1168.

#### G. Operation

232. All teachers in the Community Education program are assigned, supervised and evaluated by the GRPS, in terms of course content and teaching methodology.

*Reference:* Wagner, Vol IIIB, p 553; Dwyer, Vol IVA, p 682; Jaks, Vol IVA, p 713.

233. Community Education classes are not monitored specifically for religious content.

*Reference:* Wagner, Vol IIIB, pp 542-543, 551; Jaks, Vol IVA, p 714.

234. Those students who receive grades for attending Community Education classes on leased premises receive those grades from the GRPS, and not from their school of primary attendance.

*Reference:* Wagner, Vol IIIB, p 532.

235. On the secondary level, the GRPS transfer grades for Community Education classes to the student's school of primary attendance. It is then up to that school to decide whether or not it will accept or reject such transfer of grades for credit.

*Reference:* Gritter, Vol IIIA, pp 481-482; Wagner, Vol IIIB, pp 533, 534.

#### V. State Aid

##### A. Payment for Part-Time GRPS Students

236. Nonpublic school students attending Shared Time and Community Education classes conducted by the GRPS on leased premises are part-time public school students. Such part-time public school students may be counted in membership by the GRPS for the purpose of computing state school aid payments to be made to it. The GRPS receives state school aid payments for part-time public school students that attend its Shared Time classes. These state school aid payments are made irrespective of whether the Shared Time classes are conducted on premises owned or leased by the GRPS.

*Reference:* See Exhibit SBE-A, §§3, 4 and 5 and Appendix A through D attached thereto; Vruggink, Vol VIIA, pp 1124-1135; Vruggink, Vol VIIB, p 1196.

237. The GRPS admits nonresident students as both full-time and part-time public school students, including students that attend Shared Time and Community Education classes operated by the GRPS on leased premises, as part-time public school students. As to this category of students, the Michigan Legislature has made an additional allowance in the state school aid act to cover the difference between the per capita cost of educating students and the amount of state membership aid generated by such nonpublic, nonresident students in part-time public school membership. In light of this additional legislative allowance that pays the full cost for nonpublic, nonresident, part-time public school students in Shared Time and Community Education classes, the GRPS may not charge tuition for such students. This additional legislative allowance is based on the legislative recognition that public school district boundaries and nonpublic school boundaries are not uniform. Such appropriation facilitates making Shared Time and Community Education instruction available to all students attending nonpublic schools located within a public school district regardless of whether such students live inside or outside the public school district boundaries.

*Reference:* Exhibit SBE-A, ¶6 and Appendix E attached thereto; Vrugink, Vol VIIA, pp 1153-1157.

#### B. State Aid Payments Exceed Shared Time and Community Education Costs

238. Some educational programs conducted by the GRPS, such as special education, cost more than the revenue generated by the students in such programs. Other educational programs conducted by the GRPS, such as kindergarten, cost less than the revenue generated by the students in such program. The state aid funds received by the GRPS for students in part-time public school membership in Shared Time classes, including before and after school Community Education classes, offered on leased premises at nonpublic schools, ex-

ceed the cost of providing such classes. The Shared Time and before and after school Community Education classes involving part-time public school students represent approximately 3,000 full-time equated state aid memberships in 1981-1982. The elimination of those 3,000 full-time equated state aid memberships would mean a reduction in state aid payments to the GRPS in fiscal 1981-1982 of approximately six million dollars. Such a reduction in state aid payment to the GRPS in 1981-1982 would have reduced the amount of revenue available to the GRPS to conduct programs other than Shared Time and Community Education.

*Reference:* Vrugink, Vol VIIA, pp 1093-1094; Vrugink, Vol VB, pp 944-945, 948; Vrugink, Vol VIIA, pp 1133-1135, 1139-1141; Vrugink, Vol VIIB, pp 1181-1187; GRPS Exhibit NNN.

### VI. Miscellaneous

#### A. Enrollment Trends

239. Over the past eleven years, the percentage of the student population in the Grand Rapids area attending nonpublic schools has not changed appreciably. In the 1971-1972 school year 29.8% of the school age population attended nonpublic schools in the city of Grand Rapids, whereas in 1981-1982, 30.3% of the school age children attended nonpublic schools. Concerning comparative enrollment statistics regarding public school memberships and nonpublic school memberships, GRPS Exhibit TTT indicates the following:

School Year	Public School Membership	Nonpublic School Membership
1971-1972	34,468	14,641
1972-1973	33,902	13,942
1973-1974	32,688	13,301
1974-1975	31,785	12,854
1975-1976	31,221	12,530

1976-1977	30,658	11,997
1977-1978	29,486	11,460
1978-1979	27,636	10,825
1979-1980	26,923	10,667
1980-1981	26,318	10,757
1981-1982	26,142	11,362

*Reference:* GRPS Ex TTT.

240. Compared with other public school districts in the area, the declining enrollment in the GRPS system has not been as large as the decline in other systems, such as Wyoming and East Grand Rapids, which have experienced 27% and 37% declines, respectively.

*Reference:* GRPS Ex RRR and SSS.

241. Although the Board has experienced a declining enrollment over the past few years, projected enrollments by the late 1980's suggest that the enrollment will begin to increase in light of the projected increase in school age children.

*Reference:* Vruggink, Vol VIIA, p 1147.

242. The operation of the Shared Time program does not draw children away from the public school system into nonpublic schools.

*Reference:* Dwyer, Vol IVA, p 682; Berends, Vol IVB, pp 761-766; Jaksa, Vol IVA, p 731.

243. Those nonpublic schools which have experienced increased enrollments do not attribute such increases to the fact that Shared Time services have been made available on leased premises.

*Reference:* Mish, Vol IA, p 55; Mish, Vol IB, p 197; Dwyer, Vol IVA, p 682.

244. The nonpublic school in the area with the largest reported increase in enrollment and projected enrollment does not participate in the Shared Time program.

*Reference:* Berends, Vol IVB, pp 761-766.

245. The number of transfers from the public school system to the nonpublic schools and from the nonpublic schools to the public school system, have been approximately the same, something less than 500 students per year.

*Reference:* Vruggink, Vol VIIA, pp 1123-1124; Vruggink, Vol VIIA, p 1148.

#### B. Nonpublic School Finances

246. The Shared Time and Community Education Programs were not instituted because of any nonpublic school financial crisis, nor were any nonpublic schools on the verge of closing prior to the initiation of those programs.

*Reference:* Mish, Vol IB, pp 187-188; Hollern, Vol IIIB, p 620; Dwyer, Vol IVA, p 694; Int Ex A, Tab B, ¶7; Int Ex A, Tab C, ¶16; Int Ex A, Tab M, ¶7.

247. No nonpublic school, with students presently receiving Shared Time or Community Education services, is experiencing or has experienced any financial crises concerning its future existence as an institution of learning.

*Reference:* Mish, Vol IB, pp 187-188; Hollern, Vol IIIB, p 620; Dwyer, Vol IVA, p 694; Int Ex A, Tab B, ¶7; Int Ex A, Tab M, ¶7.

#### C. Political Entanglement

248. Mr. Lawrence Pojeski, a Board member for the past 13 years, stated that the operation of the Shared Time and Community Education instructional programs have not been divisive. Mr. Pojeski expressed the opinion that the program has



had quite the opposite effect, that is, an effect which has served to bind the community together.

*Reference:* Pojeski, Vol VA, p 905.

249. School administrators and teachers with the GRPS have consistently received very favorable feedback from the community in terms of the benefit and value of the Shared Time and Community Education programs.

*Reference:* Vrugink, Vol VIIA, pp 1144-1145; GRPS Ex C, ¶13; GRPS Ex F, ¶18; GRPS Ex M, ¶12.

250. In 1976, the Board sponsored a survey of the community which revealed that 82% of those responding to the survey are in favor of the Shared Time program.

*Reference:* Vrugink, Vol VIIA, p 1145; GRPS Ex KKK, p 10.

#### D. Title I

251. The Title I program (of the Elementary and Secondary Education Act of 1965) is and was designed to deal with the educational needs of economically and educationally disadvantaged children. Under that program, Federal monies are funneled into "target areas" to deal with the educational needs of children located within such areas. The target areas are determined by the concentration of low income families living within public school attendance areas. Under the Title I program, all children living within the target area, who are performing educationally below a prescribed standard, whether attending public or nonpublic schools, are eligible to receive on a comparable basis the educational services made available through the Title I program.

*Reference:* Vrugink, Vol VIIA, pp 1115-1121.

252. Under that program, monies are allocated to each building and the public school building principal is then vested with substantial discretionary authority to determine the manner in which the available funds will be utilized to meet the educational needs of his/her students. For example, the principal at Alexander opted to use the available monies to hire teacher aides, as opposed to hiring additional reading specialists. Using that approach, the principal at Alexander was and is able to utilize seven support staff members with the monies made available to him.

*Reference:* Young, Vol VIIIA, pp 1318-1319; Vrugink, Vol VIIA, pp 1136-1137.

253. To the extent that the Title I program funding is not able to meet all of the student needs in target areas, the Shared Time instructional program, particularly in the areas of remedial math and remedial reading, serves to "fill in the gaps" left by Title I. The operation of the Shared Time program permits the GRPS to meet the educational needs of low achievers attending nonpublic schools who reside outside of the target areas, in the same manner in which those needs would be met within target areas. Accordingly, the Shared Time remedial instructional program and the Title I program parallel one another, not only in terms of purpose and effect, but also in that Title I provides for the provision of such services onsite in the nonpublic school setting.

*Reference:* Vrugink, Vol VIIA, pp 1145-1147; Vrugink, Vol VIIB, p 1198; Vrugink, Vol VIIA, pp 1116-1117; Dwyer, Vol IVA, p 676; Jaks, Vol IVA, p 730.

#### E. Feasibility Study

254. The Board conducted an extensive feasibility study to examine whether or not it would be administratively feasible to operate all of the Shared Time course offerings in public school buildings. Elements of the study included avail-

ability of space in public school buildings and the time and cost involved in bringing the students to the public school buildings.

*Reference:* Young, Vol VIIIA, pp 1333-1339; GRPS Ex JJa-JJqq.

255. If such a program were instituted, the cost for transportation would be something in excess of \$830,000.

*Reference:* Young, Vol VIIIA, p 1343.

256. Based upon the statistics and data compiled in relation to the feasibility study, it was concluded that from an administrative point of view, it would not be feasible to conduct the Shared Time program at public school buildings.

*Reference:* Young, Vol VIIIA, p 1343; GRPS Ex JJa-JJqq.

#### **F. Conducting Educational Programs Outside School District Boundaries**

257. The Grand Rapids Board of Education acquires facilities located outside the district and conducts in such facilities a variety of educational programs, including Special Education, Adult Education, Community Education and Shared Time instruction.

*Reference:* Vrugink, Vol VIIA, pp 1157-1158; Exhibit SBE-A, ¶2.

258. The Michigan Department of Education approves payments of state school aid to the Grand Rapids Board of Education for part-time public school pupils receiving Shared Time instruction on leased premises located outside the district.

*Reference:* Exhibit SBE-A, ¶2; see also, references to ¶36.

#### **G. Requirements For Graduation And Course Offerings**

259. As a general rule, graduation requirements are imposed by local boards of education of both public and nonpublic schools rather than by the Michigan Legislature. The Michigan Legislature has not required that public or nonpublic school students take a course in physical education, music, art, remedial reading or remedial mathematics as a condition of graduation. Further, the Michigan Legislature has not required that the leisure time enrichment courses offered in Community Education by the Grand Rapids Board of Education must be taken by either public or nonpublic school students as a condition of graduation.

*Reference:* Vrugink, Vol VIIA, pp 1148-1153; see also, references to ¶36.

260. As a general rule, course offerings are determined by local public and nonpublic school boards of education rather than by the Michigan Legislature. The Michigan Legislature has not required that public school districts or nonpublic schools offer courses in music, art, remedial reading and remedial math. Further, the Michigan Legislature has not required that the leisure time and enrichment courses offered in Community Education by the Grand Rapids Board of Education must be offered by either public school districts or nonpublic schools.

*Reference:* Vrugink, Vol VIIA, pp 1148-1153; see also, references to ¶36.

### **VII. Plaintiffs' Standing Under Article III**

#### **A. Alleged Taxpayer Status**

261. Plaintiffs assert standing herein based only upon their status as taxpayers.

*Reference:* Plaintiff's Complaint, ¶¶5, 20, 21, 22 and 25.



### B. Lack of Injury to Plaintiffs

262. None of the named plaintiffs testified in this cause. Plaintiffs have made no showing whatsoever that their taxes have been increased by the operation of the Shared Time and Community Education programs. Plaintiffs presented no proofs in support of the allegations of paragraph 21 of their Complaint that “[i]t is contrary to the religious conscience of each of the Plaintiffs, and is contrary to the purposes for which the organizational Plaintiff was formed, to be forced by operation of the taxing power to contribute to the propagation of Religion and the support of religious schools.” The evidence is uncontroverted that the allegations in paragraph 22 of Plaintiffs’ Complaint are untrue since state school aid payments more than cover the cost of the Shared Time and Community Education programs. Plaintiffs have presented no evidence that if they prevail herein, their tax bills will decrease. The record is clear that, if plaintiffs prevail, the school district in which plaintiffs reside (see ¶5 of the Complaint) will receive approximately six million dollars (\$6,000,000.00) less in state aid funds and it will, therefore, have less revenue available to conduct educational programs other than the Shared Time-Community Education instruction here at issue. Further, children will be denied valuable secular education services currently provided in the Shared Time and Community Education programs.

*Reference:* Vrugink, Vol VB, pp 944-945, 948; Vrugink Vol VIIA, pp 1133-1135, 1139-1141; Vrugink Vol VIIB, pp 1181-1187; GRPS Exhibit NNN; Mrs. Bylsma, Vol VIII-B, pp 1388-1393.

## VIII. The Religiously-Oriented Nonpublic Schools That Lease Space To The GRPS For Shared Time And Community Education Programs Are Not Pervasively Sectarian

### A. Catholic Schools

263. The organization, makeup and operation of Cath-

olic schools in Michigan has drastically changed in the past several decades. Forty or fifty years ago such schools were under the sole direction of the parish pastor and were operated and staffed entirely by nuns. There were no lay teachers in the schools. All of the students in attendance at such schools were of the Catholic faith. Religion was taught using the Baltimore Catechism with questions and answers which had to be memorized. The students were required to go to church services every morning.

*Reference:* Int Ex A, Tab A, ¶¶8, 9, 10; Tab F, ¶¶13, 14, 18, 20; Tab D, ¶10; Mish, Vol IA, pp 171-174; Wagner, Vol IIIB, pp 563, 566, 568, 569.

264. There are 19 elementary and 2 secondary Catholic schools located within the Grand Rapids School District with 6,233 students in attendance. Catholic schools have existed in Grand Rapids since the community was initially settled, well over 25 years ago. Over half of these schools are located in the inner city in economically deprived areas.

*Reference:* Int Ex A, Tab B, ¶¶1, 8, 17.

265. The day-to-day operation of each elementary Catholic school is now governed by its own Board of Education which operates under a written constitution. Members of these Boards are elected by ballot cast by parents and others in the parish. Board members are lay persons and need not be of the Catholic faith and, accordingly, need not be members of the Catholic Parish. Persons of religious faiths other than Catholic presently serve on such Boards. Generally, the principal of the school and the pastor of the parish are ex officio, nonvoting members of the Board. The principal is hired by, is responsible and reports to the Board concerning school operations. Parents thereby have a direct voice in and control of the education of their children. The Catholic elementary schools are not church-governed.



*Reference:* Int Ex A, Tab A, ¶8; Tab B, ¶25; Tab C, ¶2; Tab D, ¶¶12, 13, 15; Tab E, ¶6; Tab F, ¶¶18, 20; Mish, Vol IA, pp 30, 31, 33, 66-68, 93, 165, 166, 177, 189; Cichewicz, Vol IIA, pp 295, 299, 300, 303, 309; Dwyer, Vol IVA, p 673; Jaksa, Vol IVA, pp 703, 704.

266. The Boards of Education for elementary and secondary Catholic schools were organized pursuant to principles adopted at the meeting of the Catholic Bishops at Vatican II in the mid-1960's. This organizational development has resulted in a shift of control over Catholic schools from pastors, religious orders and Bishops, to locally elected Boards of Education.

*Reference:* Mish, Vol IA, pp 164-166; Ex 31, p 4, 136, 147; Ex 33, ¶140, p 38; Int Ex A, Tab A, ¶9; Tab B, ¶25; Tab F, ¶¶18, 20; Wagner, Vol IIIB, pp 563-566.

267. The purpose of Catholic schools is two-fold: to educate students to take part in society by providing secular instruction comparable to that provided in the public school and to provide the student with an opportunity to receive religious instruction. Catholic schools also have as their purpose to provide educational opportunities for disadvantaged children in poverty areas.

*Reference:* Ex 24, p 1; Ex 31, p 144; Ex 32, p 639; Mish, Vol IA, pp 69, 162-164, 174, 175, 181; Int Ex A, Tab A, ¶¶6, 11; Tab B, ¶¶3, 6, 7, 12; Tab D, ¶¶14, 15; Tab E, ¶9; Tab F, ¶¶6, 16; Tab K, ¶¶4, 7; Wagner, Vol IIIB, pp 560, 561, 564, 565, 572, 573, 581-583; Hollern, Vol IIIB, pp 602, 618, 619; Jaksa, Vol IVA, pp 727, 728.

268. The two Catholic secondary schools are governed by the Interparochial High School Board of Education. The articles of association for such Board provide that membership on the Board consists of the Bishop of Grand Rapids

or his representative, five elected pastors, two representative nuns and nine lay persons elected by parishes from which students attend the two high schools. Presently serving on the Board are 10 lay persons, one priest and one nun, notwithstanding the provisions of the articles of association. The Catholic secondary schools are not church-governed.

*Reference:* Wagner, Vol IIIA, pp 494, 564, 565, 577-580; Ex 36; Ex 44; Ex 45.

269. The Catholic schools admit students free of any restriction based upon religious grounds. Indeed, at St. Andrews approximately 50% of the student body is non-Catholic and at St. Stephens, approximately 43% of the student body is non-Catholic.

*Reference:* Int Ex A, Tab A, ¶9; Tab B, ¶¶18, 19, 20; Tab C, ¶¶7, 8; Tab D, ¶¶8, 11, 14; Tab E, ¶¶8, 9, 10; Tab F, ¶¶15, 16, 17, 21; Tab K, ¶¶5, 6; Tr., Mish, Vol IA, pp 56, 135, 170; Wagner, Vol IIIA, pp 502, 561; Hollern, Vol IIIB, pp 592, 621; Ex 34; Dwyer, Vol IVA, p 673; Jaksa, Vol IVA, p 718.

270. The Catholic schools do not restrict the hiring of teachers on religious grounds. Teachers are hired on the basis of competence and must be certified by the state to teach in their assigned positions. For the most part, lay persons administer such schools and teach the students. Sixty-six percent of the teachers in these Catholic schools have received their college education from public institutions of higher learning. Almost all (i.e., 85%) of the elementary lay teachers in such schools received their practice teaching in public schools.

*Reference:* Int Ex A, Tab A, ¶¶7, 8; Tab B, ¶¶28, 29; Tab C, ¶¶3, 4; Tab K, ¶¶2, 3; Mish, Vol IA, p 169; Wagner, Vol IIIA, pp 500, 560; Hollern, Vol IIIB, pp 600, 619; Ex 35; Jaksa, Vol IVA, pp 704, 705, 734.

271. Courses in religious instruction are provided separately from secular courses in the Catholic schools. Attendance at religious instruction classes is not required of Catholic school children who are not of the Catholic faith. This is consistent with national guidelines issued by the Catholic Bishops mandating respect for the individual consciences of students.

*Reference:* Int Ex A, Tab B, ¶21; Tab C, ¶10; Tab D, ¶10; Tab F, ¶15; Mish, Vol IA, pp 116, 173, 191, 192, 193; Wagner, Vol IIIB, pp 561, 562, 569, 581, 582, 583; Hollern, Vol IIIB, pp 603, 604; Ex 31, pp 114, 116.

272. The integrity of Catholic school secular instruction is free of distortion or intrusion of improper or unrelated religious content. No religious restrictions are placed upon teachers respecting the content of such secular instruction. The quality of such instruction is comparable to that which is provided by public schools and meets the requirements of Michigan education laws. Textbooks used in such courses are in use in the public schools and contain no religious references. Graduates of such Catholic schools are accepted for enrollment at other public schools and at public institutions of higher education.

*Reference:* Int Ex A, Tab A, ¶¶6, 7, 10, 11; Tab C, ¶¶10, 13, 14, 26, 27, 28; Tab C, ¶¶3, 5, 6; Tab E, ¶9; Tab F, ¶¶6, 15; Tab K, ¶¶4, 7; Mish, Vol IA, pp 69, 128, 130, 157, 158, 167, 181; Wagner, Vol IIIB, pp 560, 561, 563, 564, 565, 571; Hollern, Vol IIIB, pp 602, 618, 619; Jaksa, Vol IVA, pp 727, 728; Ex 32, p 369.

273. The subject of religion is presented at Catholic schools in a manner which respects the individual conscience of each student. The tenets of other religious faiths are openly discussed and fairly presented to the student. No effort is made to compel or coerce students into accepting or obeying

any doctrine of the Catholic faith. Textbooks used in religious courses represent other religions fairly. Instruction does not rely upon rote memorization of religious principles, but is based upon a strong appeal to reason. Such schools do not have as a dominant purpose the inculcation of religious values. Religion is taught as much by the manner in which the student is treated as by substantive instruction.

*Reference:* Ex 31, p 43, ¶76; p 107, ¶181 (sub ¶s 1, 2 and 3); p 114 (lines 24-26); p 121 (lines 16-21); p 158, ¶264; Int Ex A, Tab A, ¶10; Tab B, ¶¶23, 24; Tab C, ¶¶3, 5, 6, 10, 11, 12; Tab D, ¶¶10, 14, 15; Tab E, ¶¶7, 8, 10; Tab F, ¶15; Mish, Vol IA, pp 126, 127, 134-136, 169, 170-174, 190, 191-193, 196-198; Wagner, Vol IIIB, pp 562-564, 566, 568, 569.

274. Religious services for students in Catholic schools are held usually not more often than once a week and in some schools only approximately six times a year. Students of religions other than Catholic need not attend such services if their parents so request. No student is made to participate in any religious worship.

*Reference:* Int Ex A, Tab B, ¶¶21, 22; Tab C, ¶9; Tab D, ¶9; Mish, Vol IA, p 198.

275. Catholic schools are not an integral part of the religious mission of the Catholic Church.

*Reference:* Int Ex A, Tab B, ¶15; Int Ex A, Tab C, ¶12.

## B. Christian Schools

276. The Grand Rapids Christian School Association operates five elementary and one secondary level schools located within the Grand Rapids Public School District. There are 2,856 students enrolled at the present time. The secondary school, Grand Rapids Christian High School, is accredited by



the North Central Association of Colleges and Schools and by the University of Michigan as satisfying their secular educational requirements of accreditation.

*Reference:* Int Ex A, Tab G, ¶1; Tab K, ¶4; Gritter, Vol IIB, p 373.

277. Christian schools are owned and operated by the Grand Rapids Christian School Association, made up of parents of students attending Christian schools and other persons who support such schools. All members subscribe to the so-called "basis" in which they acknowledge their common belief that "the priority and responsibility for educating children resides in the parents and not in the state or church." A Board of Trustees of the Association is elected by vote of the membership and is empowered to operate the Christian schools and make basic policy decisions. Each Christian school also has an elected Board of Trustees responsible for the operation of that school under the supervision of the Association Board. Plaintiffs have acknowledged that, as a matter of law, there is a separate identity and corporate interest of the Association apart from the Christian Reformed Church.

*Reference:* Ex 77; Int Ex A, Tab G, ¶¶5, 6; Tab H, ¶11; Tab I, ¶8; Tab J, ¶9; Gritter, Vol IIB, pp 371-376, 380-382, 406, 417, 428, 429, 433, 434, 477; Boss, Vol IIA, pp 626-628; Ex 82, p 1; Dilley, Vol IIIA, pp 476-477.

278. The basic purpose of Christian schools is to prepare students to be responsible and productive citizens. In addition to the teaching of secular subjects, comparable to those provided in public schools, religion classes are provided. This religious instruction does not consist of the teaching of any church doctrine or the tenets of any particular religious faith, but rather, a study of the Bible and its application to the lives of students. Students at Christian schools are instructed in church doctrine by attending catechism classes taught by

the churches to which they belong. Such instruction takes place outside of school hours and off school premises. Such instruction is the responsibility of the churches and not the Christian schools.

*Reference:* Int Ex A, Tab G, ¶¶7, 16; Tab J, ¶12; Ex 82, p 1, bottom five lines; p 2, top 4 lines; page 3, lines 4-8.

279. In Christian school religion classes, open discussion and exchange occurs regarding the various religious beliefs represented in the student body. No student is required to adhere to or accept any particular dogma or doctrine of any church. The schools exist to serve students of a wide range of religious beliefs, and not to indoctrinate or inculcate students with doctrines or beliefs of any particular religious faith.

*Reference:* Ex 82, p 10, lines 6-10; Int Ex A, Tab G, ¶¶7, 10, 16; Tab J, ¶11.

280. Christian schools in Grand Rapids do not impose any religious restrictions on student admissions. Parents who enroll their children in Christian schools need not profess any religious faith but must agree to accept the religious orientation of the Christian schools. In the present school year, for example, families affiliated with over 100 different churches, and some 50 different denominations, send children to schools in the Association.

*Reference:* Int Ex A, Tab G, ¶¶10, 11; Tab H, ¶¶8, 9; Tab I, ¶7; Tab J, ¶8; Gritter, Vol IIB, pp 399, 400, 405, 407, 412, 423, 424, 434; Boss, Vol IVA, pp 634-637; Ex 72; Ex 68.

281. Students attending Christian schools are not required to attend or participate in religious worship. Students are required to attend weekly meetings where guest speakers discuss the application of religious themes to everyday living. These meetings are termed "chapel" but, do not consist of



any liturgical service or religious worship and are not held in any church.

*Reference:* Int Ex A, Tab I, ¶12.

282. Christian schools do not require their teachers to be members of any particular faith. Teachers on the staff of the Christian schools are members of various churches and religious faiths. Approximately 70% of these teachers possess Master Degrees. All teachers in these Christian schools are certified to teach by the State and are employed based upon their professional competence in the subjects which they are to teach.

*Reference:* Int Ex A, Tab G, ¶8; Tab J, ¶10; Gritter, Vol IIIA, p 480; Boss, Vol IVA, p 629.

283. Attendance at Christian schools fulfills the requirements of the Michigan Compulsory Education Law. Such schools teach core subjects comparable to those offered in the public schools of the district as mandated by the state legislature. Students leaving Christian High School meet the secular educational requirements for admission to public institutions of higher education. In the teaching of secular subjects relevant moral and religious questions are addressed but not so as to distort or intrude in the secular subject matter.

*Reference:* Intervenor Ex A, Tab G, ¶¶7, 9; Gritter, Vol IIIA, p 480.

284. Christian Schools are not an integral part, or any part of the religion mission of any church. The schools represent an extension of the home, not the church.

*Reference:* Gritter, Vol IIB, p 406; Int Ex A, Tab G, ¶6; Plaintiffs' Ex 77.

### C. Lutheran Schools

285. Immanuel-St. James Lutheran School, the only Lutheran school presently participating in the Shared Time program, is operated by a Joint Board of Education whose members are lay people elected by the Voters' Assembly of lay members of the two Lutheran congregations, Immanuel Lutheran and St. James Lutheran. The pastors of the two congregations are invited to attend Board meetings but have no vote. The day-to-day operations of the school are the responsibility of the school principal, subject to the policies of the Joint Board. The Lutheran school is not church-governed.

*Reference:* Int Ex A, Tab M, ¶11; Tab N, ¶6; Int Ex C, ¶9; Plaintiffs' Ex 90, Answer 79.

286. Immanuel-St. James Lutheran School is housed in two separate buildings and has a total enrollment of 96 students. Approximately one-sixth to one-eighth of the students are of religious faiths other than Lutheran. While preference in attendance at the school is given to Lutherans, attendance is open to any who desire a Christian education for their children. Children of other religious faiths are openly accepted. Since ample space exists, this preference of Lutherans does not work to exclude those of other faiths.

*Reference:* Int Ex A, Tab M, ¶¶2, 13; Tab N, ¶9; Johnson, Vol VA, pp 820-823, 850.

287. The primary purpose of Immanuel-St. James School is to educate its students in the secular subjects required by state law. Its secondary purpose is to provide a Christian community for its students in which they may learn.

*Reference:* Int Ex A, Tab M, ¶¶14, 20; Tab N, ¶¶8, 9; Int Ex C, ¶10.

288. Teachers in the Lutheran school are certified to teach in their subject matter areas by the state and meet the sec-

ular requirements for such teacher certification. Immanuel-St. James School provides core subject courses that are comparable to those provided by the public school districts. All textbooks, except for those employed in religious courses, could be found in any public school in Michigan. While teachers address religious and moral questions which may be relevant to a given course, this is not done in such a manner as to distort or intrude in the secular instruction.

*Reference:* Int Ex A, Tab M, ¶¶22; Tab N, ¶¶8, 9; Johnson, Vol VA, pp 830, 831, 833, 846, 847; Int Ex C, ¶11.

289. No child attending Immanuel-St. James School is compelled to accept or believe the Lutheran faith. No secular subject is taught in such a way as to indoctrinate the student in any particular religious belief. There is no attempt to proselytize. Students of other faiths are encouraged to participate fully in the programs offered by their own congregations.

*Reference:* Int Ex A, Tab M, ¶¶16, 22; Tab N, ¶9; Int Ex C, ¶12.

290. The Lutheran school is not an integral part of the religious mission of any church.

*Reference:* Int Ex A, Tab N, ¶9; Int Ex C, ¶11.

#### **D. Catholic, Christian and Lutheran Schools are Religiously-Oriented, Not Pervasively Sectarian**

291. Catholic, Christian and Lutheran Schools maintain that religion or the Word of God is present throughout their schools. This statement means that the faculty and students strive to maintain an atmosphere and attitude of respect and love for one another in whatever activity or class they may be pursuing, in the form of a Christian community.

*Reference:* Int Ex A, Tab A, ¶10; Tab B, ¶27; Tab C, ¶¶3, 5, 12; Tab G, ¶¶7, 15, 16; Tab M, ¶¶14, 22; Tab N, ¶¶8, 9; Ex 44, §1.3(e); Ex 82, p 2, line 27; p 3, line 1-3; p 4, line 5-9; p 9, last 6 lines; p 10 Schipper statement; Int Ex C, ¶11; Johnson, Vol VA, p 831.

292. These schools are religiously-oriented, but they are not pervasively sectarian institutions.

*Reference:* Please see the references following ¶¶263 through 290.

#### **IX. The Baptist Schools Are Pervasively Sectarian**

293. The Grand Rapids Baptist Academy operates four elementary schools and one secondary level school in the Grand Rapids area, three of which are located within the Grand Rapids School District. Total enrollment in the five schools in the present school year is 1,141 students. Other than Outdoor Education, students attending the Baptist schools do not participate in any Shared Time or Community Education programs conducted by the Grand Rapids School District.

*Reference:* Berends, Vol IVB, pp 759-761, 763, 764, 765.

294. The Baptist schools are projecting an enrollment for the 1982-1983 school year of somewhere between 1300 and 1350 students. These schools have experienced a rapid growth since their organization in 1972, when they started with 90 students.

*Reference:* Berends, Vol IVB, pp 758, 761.

295. The Grand Rapids Baptist Academy, the fastest growing nonpublic school in the area, has elected not to participate in the Shared Time program because it cannot live with the requisite loss of control which attaches to such participa-



tion. The Grand Rapids Baptist Academy has not and will not participate in the program because it would lose control over the identity and religious background of those teachers who would or may be selected by the GRPS to teach in the program. Further, the Academy believes that it is not in their best interests as a Baptist school to have GRPS teachers in their buildings who do not meet the strict standard of faith which applies to all teachers employed by the Academy, which requires that such staff members have a spiritual commitment to Jesus Christ as their Savior.

*Reference:* Berends, Vol IVB, pp 766, 767.

296. The primary purpose of the Grand Rapids Baptist Academy is to help its students to know God and to be able to formulate their own set of religious values and convictions based on the Word of God. The Baptist schools conduct their operations and provide their curriculum to carry out that primary purpose. Whatever the course or subject matter, that purpose is of paramount importance. All subjects are taught with a religious view. The Baptist world and life view is interwoven in the secular subject matter as a means of transmitting the specifics of the Baptist creed. Spiritual and religious truths must be incorporated in every subject. Many of the Baptist school textbooks used in secular subjects are bibliocentric or Christ-centered.

*Reference:* Berends, Vol IVB, pp 768-771, 775, 777; Ex 9, p 5; Ex 9, p 2, ¶1; p 4, ¶4.

297. The Baptist schools, as a condition of employment, require that their teachers sign a written statement expressing their personal "full and sincere" commitment to the tenets of faith as set forth in the Doctrinal Statement of the General Association of Regular Baptist Churches. That statement provides in part, as follows:

"I totally accept the doctrinal statement of the Baptist Academy and express my full and sincere commitment to the Doctrinal Statement of the General Association of Regular Baptist Churches, including affirmation that:

1. The Bible, verbally and plenary inspired, is God's infallible word, authoritative for all faith and life.
2. There is one God, personal, infinite, perfect, and eternally existing as Father, Son and Holy Spirit.
3. Jesus Christ is true God and true man, was born of the Virgin Mary, lived a sinless life, provided substitutionary atonement for lost man, and arose bodily from the grave.
4. The Holy Spirit is a divine person and works in conviction of men and in the regeneration, sanctification, and preservation of the believer.
5. God directly created the universe from no pre-existing substance. We reject both naturalistic and theostic evolution.
6. Satan is a fallen, created personality, opposed to all that is holy and destined for eternal punishment.
7. Man was made in God's own image and fell into sin in Adam and is now a sinner both by nature and choice, and can be restored to God's favor only by God's provision in Christ as applied by the Holy Spirit.
8. God's provision in Christ is the only grounds for man's justification which includes both pardon from sin and the gift of eternal life.
9. Salvation comes to man only by grace through faith in Jesus Christ, apart from any human merit.



10. All those who have experienced salvation are members of the 'church which is his body', and thus are eligible for baptism and membership in the local church.
11. Baptism by immersion and the Lord's supper are ordinances of the church.
12. Jesus Christ is the Head of the church and every local church has the right under Christ to govern itself.
13. Every believer is eternally secure, being 'kept by the power of God'.
14. All persons will experience resurrection, believers to a state of eternal felicity and unbelievers to eternal punishment.
15. The return of Christ includes both the rapture of the church and his return in glory. The first is for his church which is personal, pre-tribulational, pre-millennial, and may occur at any moment. The second is his return to earth to establish his righteous reign over the earth. This coming is visible, personal, pre-millennial, and in power and great glory.
16. Civil government is by divine appointment and separation between it and the church should be maintained."

The Baptist Academy requires that no less than 90% of its teachers be members of the Baptist church. Of the remaining number, such teachers must belong to Bible believing churches, such as Bethany Bible or Calvary Church.

*Reference:* Int Ex B; Berends, Vol IVB, pp 768, 771, 772; Ex 9, p 5.

298. Admission of students is restricted to children of families in which at least one of the parents, preferably both, are born-again Christians, having committed their lives to Jesus Christ as their personal Savior. Also it is expected that the values and teachings of the Word of God will be prevalent in their home and family life. Parents are expected to be faithful in church attendance and to have a positive Christian testimony in the community.

*Reference:* Berends, Vol IVB, p 770; Ex 9, p 14.

299. The Baptist Academy is an integral part of the religious mission of the Baptist Church.

*Reference:* Berends, Vol IVB, p 775; Plaintiffs' Ex 9; Int Ex B.

300. The Baptist schools are pervasively sectarian institutions.

*Reference:* Berends, Vol IVB, pp 758-778; Plaintiffs' Ex 9; Int Ex B.

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, a District of Columbia corporation; PHYLLIS BALL, KATHERINE PIEPER, GILBERT DAVIS, PATRICIA DAVIS, FREDERICK L. SCHWASS, and WALTER BERGMAN,  
Plaintiffs,

vs.

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS, a Municipal corporation; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan,  
Defendants,

and

IRMA GARCIA-AGUILAR and SIMON AGUILAR, husband and wife, Individually and as Parents of Christina, Miguel and Carlos, Minors; BRUCE BYLSMA and LINDA BYLSMA, husband and wife, Individually and as Parents of Jeff and Eric, Minors; ROBERT COMER and PENNELOPE COMER, husband and wife, Individually and as Parents of Marie Lin, Robert and Michael, Minors; CLARENCE R. COVERT and ROSALEE COVERT, husband and wife, Individually and as Parents of Christina and Deborah, Minors; SCIPUO FLOWERS and JANICE FLOWERS, husband and wife, Individually and as Parents of David and DeWitt, Minors; JOHN LEETSMA and SHIRLEY LEETSMA, husband and wife, Individually and as Parents of Amy, a Minor,

Intervenors.

File No.  
G80-517-CA1

PLAINTIFFS' PROPOSED FINDINGS OF FACTS  
AND CONCLUSIONS OF LAW

This nonjury trial commenced on May 10, 1982 and consumed eight trial days. The Plaintiffs, Americans United For Separation Of Church and State, allege that the Defendants, School District Of The City of Grand Rapids and The State of Michigan, have violated the Establishment Clause of the First Amendment to the United States Constitution by providing teachers and equipment to forty-one private religious schools in the Grand Rapids area. Having reviewed the testimony of the witnesses, numerous exhibits, and the parties' briefs, I make the following Findings of Fact and Conclusions of Law. *Fed. R. Civ. P. 52(a)*. The following outline summarizes the Court's Findings of Fact:

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## FINDINGS OF FACT

### INTRODUCTION

1. This case was commenced August 7, 1980 by the filing of Plaintiffs' Complaint alleging that Defendant Grand Rapids School District or Grand Rapids Board of Education had leased from various nonpublic schools classrooms or portions of buildings, then staffed these facilities with teachers employed and paid by the Public School District to teach classes in subjects such as physical education, art, reading, music, and mathematics. The students involved in these "Shared Time" classes were otherwise enrolled full time in the nonpublic schools from whom the physical facilities were leased.

2. By means of Interrogatories and Exhibits admitted into evidence and testimony at trial, a multitude of facts pertaining to the program has been brought to the attention of the Court. Defendant School District utilizes a standardized form of lease (*Exhibit HHH*) to provide access to the physical properties of the various nonpublic schools, except that the lease between Defendant School District and the six schools of the Grand Rapids Christian School Association (*Exhibit 74*) covers all six schools in one document. No specific rooms or portions of buildings are described in any lease. The conceptual nature of this lease is that various rooms and areas in the nonpublic school will come within the operational effect of the lease as and when the public school teacher occupies such areas; otherwise and at other times, those rooms and areas are not under lease.

3. Public school teachers occupy the leased facilities in order to conduct classes of three different kinds:

1. "Shared Time" classes during the "regular school hours". Most of these classes are in physical education, art, music, reading, and math.



2. "After-School" Community Education classes. These are mostly arts and crafts, cooking, painting, and physical activities such as gymnastics, but see the complete list attached to *Exhibit III*. Teachers for these "public school" classes are selected from the faculty of the nonpublic school and are paid \$9.50-\$10.00 per hour by Defendant School District to teach the classes in the same building where they are employed full time by the nonpublic school.
3. Morning or "Zero Hour" Community Education classes conducted at the three nonpublic high schools, which are West Catholic, Catholic Central, and Christian High School. For a list of classes, see *Exhibits 57-58* (Christian High School), *Exhibits 92 and 93* (Catholic Secondary Schools), and the list attached to *Exhibit III*. Nearly all of the teachers for this "public school" program are recruited from the full-time faculty of the particular nonpublic high school where the classes are held.
4. From a small beginning in the years 1970-1975, these three programs have increased to the point where they involved 12,479 nonpublic school students in 1973-79. *Exhibit 28 & Exhibit 90* at Interrogatory #64. By a complicated process of "equating" these part-time students to "full time equivalent" students, Defendant School District is able to qualify for state aid, or state tax funds. For 1978-79 there were 1,872.7 full time equivalent (FTE) students for which Defendant School District received \$746.29 each in state aid, or \$1,397,577.20. *Exhibit 90* at Interrogatories 15-20. In the year 1981-82, there were about 3,000 full time equivalent (FTE) students and the amount of state aid was about \$2,000 per student, or a total of about \$6,000,000 contributed to these programs in state tax funds.

5. An issue has also developed in this case as to the sectarian character of the schools in which these "public school" programs are being offered. In order to invoke the prohibition of the Establishment Clause of the First Amendment, Plaintiffs must show that these aid programs involve diversion of significant amounts of tax funds to institutions in which religion is so pervasive that a substantial portion of their functions are subsumed in the religious mission of the institutions. See *Hunt v McNair*, 413 U.S. 734, 743 (1973). Consequently, many of the exhibits offered by Plaintiffs and much of the testimony of Plaintiffs' witnesses concerned this issue of the extent of religious activity in the approximately 41 nonpublic schools involved in this case.

## I. SECTARIANISM AT THE PRIVATE RELIGIOUS SCHOOLS

### A. The Catholic Schools

6. Many of the Catholic school administrators testified that certain books are used as guidelines specifically for Catholic schools. *Testimony of Edward Wagner* (West Catholic High School), *Dale Hollern* (Catholic Central High School), *Sister Janet Mish* (Immaculate Heart of Mary School), *Timothy Dwyer* (Sacred Heart School), and *John Jaksa* (St. Stephens School). Sister Mish, for example, stated that a pamphlet entitled "To Teach As Jesus Did" is a resource material used by her school. She agreed with paragraphs 102, 103, and 104 of that pamphlet, which state:

102 Christian education is intended to "make men's faith become living, conscious, and active, through the light of instruction . . . ." The Catholic School is the unique setting within which this ideal can be realized in the lives of Catholic children and young people.

103 Only in such a school can they experience learning and living fully integrated in the light of faith. The Catholic School "strives to relate all human culture eventually to the news of salvation, so that the life of faith will illumine the knowledge which students gradually gain of the world, of life, and of mankind . . . ." Here, therefore, students are instructed in human knowledge and skills, valued indeed for their own worth but seen simultaneously as deriving their most profound significance from God's plan for His creation. Here, too, instruction in religious truth and values is an integral part of the school program. It is not one more subject alongside the rest, but instead it is perceived and functions as the underlying reality in which the student's experiences of learning and living achieve their coherence and their deepest meaning.

104 This integration of religious truth and values with the rest of life is brought about in the Catholic school not only by its unique curriculum but, more important, by the presence of teachers who express an integrated approach to learning and living in their private and professional lives. It is further reinforced by free interaction among the students themselves within their own community of youth. *Exhibit 33 at 28-29.*

7. Paragraph 118 of the same document elucidates the threefold purpose of Catholic Schools:

118 We are well aware of the problems which now face the Catholic school system in the United States. We also wish our position to be clear. For our part, as bishops, we reaffirm our conviction that Catholic schools which realize the threefold purpose of Christian education—to teach doctrine, to build community, and to serve—are the most effective means available to the Church for the education of children and young people who thus may

"grow into manhood according to the mature measure of Christ" . . . We call upon all members of the Catholic community to do everything in their power to maintain and strengthen Catholic schools which embrace the threefold purpose of Christian education. *Exhibit 33 at 33.*

8. Another "resource material" that Immaculate Heart of Mary uses as a "guide" is the National Catechetical Directory for Catholics of the United States. *Exhibit 31.* On page 143 of that document, it states that "Catholic schools are unique expressions of the Church's effort to achieve the purposes of Catholic education among the young. They 'are the most effective means available to the Church for the education of children and young people.'" The Directory provides that the Catholic school should have a "set religion curriculum. . . ." *Id.* The school's principal and faculty are responsible for making clear the importance of religion. *Id.*

9. The special mission of Catholic schools is expressed in the following paragraph at pp. 143-144 of the National Catechetical Directory:

Its nature as a Christian educational community, the scope of its teaching, and the effort to integrate all learning with faith distinguish the Catholic school from other forms of the Church's educational ministry to youth and give it special impact. In Catholic schools children and young people "can experience learning and living fully integrated in the light of faith", because such schools strive "to relate all human culture eventually to the news of salvation, so that the life of faith will illumine the knowledge which students gradually gain of the world, of life and of mankind." Cooperative teaching which cuts across the lines of particular disciplines, inter-disciplinary curricula, team teaching, and the like help to foster these goals of Catholic education. *Exhibit 31 at 143-44.*



10. A document of "Vatican II" that is used as a resource guide by Immaculate Heart of Mary, Sacred Heart, and other Catholic schools is the "Declaration on Christian Education". The "Declaration" asserts that:

Since every Christian has become a new creature by rebirth from water and the Holy Spirit, so that he may be called what he truly is, a child of God, he is entitled to a Christian education. Such an education does not merely strive to foster in the human person the maturity already described. Rather, its principal aims are these: that as the baptized person is gradually introduced into a knowledge of the mystery of salvation, he may daily grow more conscious of the gift of faith which he has received; that he may learn to adore God the Father in spirit and in truth (cf. Jn. 4:23), especially through liturgical worship; that he may be trained to conduct his personal life in righteousness and in the sanctity of truth, according to his new standard of manhood (Eph. 4:22-24). *Exhibit 32 at 640.*

The "Declaration" emphasizes that the Catholic school is distinguished from other schools in the following way:

The Church's involvement in the field of education is demonstrated especially by the Catholic school. No less than other schools does the Catholic school pursue cultural goals and the natural development of youth. But it has several distinctive purposes. It aims to create for the school community an atmosphere enlivened by the gospel spirit of freedom and charity. It aims to help the adolescent in such a way that the development of his own personality will be matched by the growth of that new creation which he became by baptism. It strives to relate all human culture eventually to the news of salvation, so that the light of faith will illumine the knowledge which stu-

dents gradually gain of the world, of life, and of mankind. *Exhibit 32 at 645-46.*

11. The Principal of Immaculate Heart of Mary, Sister Janet Mish, a member of the Dominican Sisters, has been the Principal there for the past three years. When she applied for the position she was interviewed twice, first by the Board of Education. The Board consists of seven elected members, all of whom are Catholic, and four ex-officio members who are all Catholic and two of whom are clergy. After she was hired, her religious superiors sanctioned her travel from Saginaw to Grand Rapids. *Testimony of Sister Mish.*

12. The Immaculate Heart of Mary Church, parish center, school building, and house of residence of the Oblate Fathers are adjacent to one another at the intersection of Plymouth and Burton streets in Grand Rapids. *Id.*

13. In the school building there are religious symbols displayed such as the crucifix and the Blessed Virgin. These artifacts are not displayed in any of the shared time classrooms. Sister Mish testified that student artwork was currently displayed that was religious in nature in the lobby of the school. *Id.*

14. The majority of school children in the Immaculate Heart of Mary School come from parents who are members of the parish. Not all of the schoolchildren live in the vicinity of the parish church and school. Some come from Kentwood, Cascade, and other areas several miles from Immaculate Heart of Mary. Out of 424 children enrolled at Immaculate Heart of Mary for the school year 1981-82, only 14 are non-Catholic. The remainder of the students are Roman Catholic. *Id.*

15. There are seventeen (17) teachers on the teaching staff at Immaculate Heart of Mary, all of whom are Catholic. The



three administrators (Principal Mish, Thelma, Godell) are Catholic. *Id.*

16. The shared time classes are given exclusively to students drawn from the Immaculate Heart of Mary student body. *Id.*

17. In the "Guidelines for Parents" published by Immaculate Heart of Mary School, the following "Statement of Philosophy" says:

The educational program at Immaculate Heart of Mary School stems from the reality that children are citizens of two kingdoms, that of God and that of the world.

The staff at IHM is in partnership with school families, assisting them in the development of their sons' and daughters' God-given gifts and abilities. The children are educated for life on this earth while being helped to realize that their highest allegiance is to God, their loving Creator.

IHM provides a full grade school curriculum in an environment which offers children opportunities to live in society as mature, responsible, Christian citizens, deeply committed to God and His Kingdom. *Exhibit 6* at "i."

18. The publication states that boys from the fifth grade to the eighth grade are "encouraged" to become altar boys. When "Holy Days of Obligation" occur on a school day, all of the Immaculate Heart of Mary students attend Mass. *Exhibit 6* at 8.

19. Immaculate Heart of Mary children's masses are held every Wednesday morning at 10:00 a.m. Masses are also held on the first Friday of the month at 10:00 a.m. *Id.* at 10.

20. "Religious Studies" are specifically included in the curriculum in kindergarten and in all grades. *Id.* at 27-46.

21. The Intervenor-Defendants sought to elicit testimony from Sister Mish that Catholic schools have become more liberal in their approach to education. Sister Mish testified that today Catholic schools are less inclined to "inculcate" their students by means of rote memorization. Such changes may indeed distinguish the pedagogy of contemporary Catholic schools from that of their predecessors; even so, various passages from Parent Handbooks and other literature made available to the public by Catholic schools involved in this case establish the dominant sectarian mission of these schools. *Exhibits 1-6, 11, 21-24.* And see *Exhibit 20* at 80; *Exhibit 31* at 143, 144; *Exhibits 32, 33.*

22. Religious studies are held at Immaculate Heart of Mary in Kindergarten and in Grades 1 through 8. *Exhibit 5* at 2; *Exhibit 6* at 27-46. Not only do the students learn religious instruction, they acquire habits of religious observance. *Exhibit 5* contains additional statements, apparently directed toward parents, that reveal the extensive integration of religion into the school program.

23. Brochures from other Catholic elementary schools participating in the Shared Time and Community Education programs describe the extent of religious domination of each school and its total curriculum. In addition to literature from Immaculate Heart of Mary School, the Court has received exhibits regarding the following: St. Adalbert School (*Exhibit 1*); Saint Jude School (*Exhibit 2*); Marywood Academy (*Exhibit 3*); St. Stephen's School (*Exhibit 11*); Sacred Heart School (*Exhibit 4*); and St. Andrew's School (*Exhibit 25*).

24. Under the heading of "Guidelines for Parents", the handout for St. Adalbert begins with "A Prayer For Parents," then states the "Goals" of the school:

1. To impart knowledge in the teachings of Christ.
2. To foster the spiritual, academic, physical, cultural, emotional and social development of each student in a Christian atmosphere.
3. To help students to recognize themselves as a worthwhile person, acknowledging their own limitations, but also developing their potential.
4. To help students to respect other races, cultures and creeds.
5. To instill an awareness of others' needs and willingness to give of self and not just of material things.
6. To teach students to accept responsibility for their own actions.
7. To help each student realize that to love and serve God and others should be a joyful and fruitful experience and not a burden.
8. To provide an education which is academically second to none.
9. To operate the school so efficiently that all monies spent earn full value.
10. To provide all parents the opportunity to have their children educated at St. Adalbert School.
11. To constantly improve communications with parish families.
12. To compensate the teaching staff as well as possible within the economic capability of the parish.
13. *To maintain a teaching staff that is completely dedicated to a Catholic education.*
14. To develop the best CCD and Adult Education Programs possible.

*Exhibit 1* at pp. 2B-2C (emphasis added). Under the caption "Tuition and Fees", it states that "Parishioners are encouraged to donate at least \$15.00 a Sunday" (presumably to the parish Church). Non-parish students must pay \$800.00 per child. *Id.* at 18.

25. The Parent, Teacher, and Student Handbook for Saint Jude expresses a "Philosophy of Education" that reads as follows:

"To Teach as Jesus Did" is the basis of the Saint Jude School philosophy. Our purpose is to create a Christian atmosphere of love of God, self, and others. The school curriculum incorporates the message of Christ building a community of brotherhood which hopefully will lead to a life of service to others. To accomplish our purpose Saint Jude School strives to provide:

*A God oriented environment which permeates the total educational program.*

A friendly and supportive environment in which a positive self-concept can be developed and where sensitivity and respect for others can flourish.

Opportunities to pray, worship and celebrate as members of a Christian community.

A Christian atmosphere which guides and encourages participation in the Church's commitment to social justice.

*A continuous development of knowledge of the Catholic Faith, its traditions, teachings and theology.*

An environment which guides children to discover their uniqueness, aiding personal development, and teaching the children to share their individuality with others.

The entire Saint Jude community—families, faculty, administrators, and priests—seeks to continue, extend and compliment the work of the parents who are the primary educators of their children. *Exhibit 2* at p. 2 (emphasis added).

“Liturgical Celebrations” are described later in the hand-out:

Class liturgical celebrations are planned by the students and teachers. Parents are invited and encouraged to attend these Masses with the students. All-school liturgies take place monthly and are planned by the faculty and students. Parents are encouraged to attend. *Id.* at 8.

26. Marywood Academy “bases its education endeavors on the belief that each person is a unique individual with special abilities and needs which can best be recognized and developed within a caring Christ-centered community.” *Exhibit 3*. The Academy is “staffed with dedicated, certified teachers who are committed to Christian education. . . . Catholic beliefs are fully integrated into the total curriculum. Every student participates in daily religion class and weekly Mass or Prayer Service.” *Id.*

27. In the Parent’s Handbook distributed by Sacred Heart School, the “Philosophy of Education” stated on the first un-numbered page provides:

It is the aim of Catholic education to cooperate with our Holy Mother Church and with the parents, so as to assist, guide, inspire, instruct, and form their children so as to

help them to perfect themselves with the help of God’s grace, to the attaining of the supreme goals of human life in time and in eternity.

To this end the Catholic School shall strive:

1. To perfect the intellect of their students with all good intellectual habits, *natural and supernatural*; and
2. To perfect the will of the students with all good moral habits, *natural and supernatural*.

*Exhibit 4* (emphasis added). Sacred Heart School carries out this philosophy of education by developing students:

1. Who have a thorough grounding in Catholic belief and worship in the light of the teaching of Vatican Council II,
2. Who have a thorough grounding in general education comparable to the best in our community with a view of the requirements of modern society and economic life,
3. Who are courteous and self-disciplined,
4. Who are physically fit with good health and grace,
5. Who have an appreciation of the artistic achievements of others and have had an opportunity to show their own creative ability. *Id.* at 1-2 (emphasis added).

28. Timothy Dwyer, the Principal at Sacred Heart School, testified that the entire staff there is Catholic, except for the custodian. Out of an enrollment of 197 students, 187 are Catholic. Among the religious artifacts in the school building proper are a statue, a crucifix, and a picture of the Roman Catholic Pope. *Testimony of Timothy Dwyer*.

29. St. Stephen’s School is located in East Grand Rapids on grounds containing the St. Stephen’s Church, rectory, and con-



vent buildings. The school itself is physically connected to the church by means of a walkway. *Testimony of John Jaksa.*

30. The Principal of St. Stephen's School, John Jaksa, testified that all of the members of the St. Stephen's Board of Education are Catholic, with the exception of Shirley Rapier. Nine out of the ten teachers are Catholic. The tenth is Lutheran. The religious character of the school's student body is 57% Catholic.

31. Despite a substantial non-Catholic minority, the brochure made available to the public announces the Catholic mission of the school in unambiguous terms. *Exhibit 11.* The "School Program" described in the brochure gives a brief resume and statement of philosophy of the teachers and emphasizes the significance of Jesus Christ and God in the education of the children. *Id.* The "Spiritual Development" of St. Stephen's students pervades the entire student body, Catholic as well as non-Catholic:

#### SPIRITUAL DEVELOPMENT:

*Liturgies: Each class participates in one class liturgy each week. Students prepare the liturgy, select songs, write a commentary and the Prayers of the Faithful, do the readings of the day, serve the Mass. Each month the entire school comes together to celebrate a liturgy centering around Holy Days, major feasts, liturgical or civil celebrations.*

*Paraliturgical Celebrations: Advent services in which the entire school comes together are celebrated daily. Throughout Lent, classes participate in weekly Stations of the Cross. Each May, the students plan the parish May Crowning of Our Lady.*

*Prayer: Daily prayer as a group is conducted in each class. Traditional prayers, as well as various forms of prayer are introduced.*

*Sacramental: Daily reinforcement of Religious Formation Program at sacramental instruction.*

*Exhibit 11 (emphasis added).* No distinction is made between Catholic and non-Catholic students.

32. Mr. Jaksa testified that the statements printed under his name and picture were written by him (although not specifically for the brochure) and accurately reflect the philosophy of education at St. Stephen's School:

*Catholic School Education is essential in developing active, conscious Catholics who will lead today's society into a renewed family unit. St. Stephen School attempts to create a family atmosphere of caring and sharing. This community of faith serves as a witness to the uniqueness of God's creation. Each child has special needs and concerns. The curriculum and approach to learning centers around the child. It is my goal as administrator to lead the school and direct the energies and talents of the staff to serve the child and help him/her take a leadership role in family, church, and community as he/she enters society as an active member. *Id.**

33. The last of the Catholic elementary schools to be discussed is St. Andrew's. The sole exhibit relating to this school is an enrollment form, which, among other questions, asks whether the student is a "registered, supporting member of St. Andrew's Cathedral", the religion of the mother and father, and the place where the child was baptized. *Exhibit 25.* Although there was no testimony concerning St. Andrew's School to supplement the enrollment form, membership in St. Andrew's Cathedral is a factor in assessing tuition, if not enrollment.

34. The testimony and exhibits establish that the Catholic High Schools that receive Shared Time classes are pervasively sectarian. Edward Wagner, Principal of West Catholic High School, testified that all of the clergy teachers and 95% of the lay teachers are Roman Catholic. He and his Assistant Principal, Richard Cebelak, are also Roman Catholic. To the best of his knowledge, Mr. Wagner stated that 90% of the 1,130 students at West Catholic are Roman Catholic. The remaining 10% include Lutherans and Methodists.

35. Four credits out of a total of twenty are required in Religious Studies at West Catholic for graduation. *Exhibit 23* at "a." Under cross-examination by Mr. Hubbell, attorney for the Intervenor-Defendants, Mr. Wagner testified that religious instruction at West Catholic examines and treats other major religions in a fair manner. Ministers from other faiths appear from time to time to lecture the students. The purpose of the Catholic school, he continued, is to prepare the whole person for life, and not to "inculcate" religion into the students.

36. Nevertheless, Mr. Wagner did testify that freshmen at his school study the Old and New Testaments from a Catholic perspective. When asked by Plaintiffs' counsel if he agreed that his school is merely Christian and not intensely Catholic, he did not agree. The West Catholic Student Handbook states the following:

This sentence from our department's philosophy sums up the ideal we see ourselves about: by imparting "the MESSAGE of CHRIST academically and pastorally . . . . CHRIST will create a COMMUNITY OF SERVICE here at West."

*Exhibit 24* at 18. (emphasis in original). Religious studies are required. *Id.*

37. The most impressive evidence of the sectarian character of West Catholic High School lies in the booklet describing its programs. The Introduction to *Exhibit 24* summarizes the variety of course and athletic offerings at West Catholic. In the opening and closing paragraphs, it states the following about the integration of religion into the curriculum:

West Catholic features sound moral and religious values rooted in our Catholic, Christian heritage. Our students are shown a direction and meaning for life during their most critical years. To guide them in these critical years is *a carefully screened faculty and administration* made up of lay and religious men and women, *dedicated to the principles of Catholic education*. Several priests from surrounding parishes add a special dimension and variety to serve the sacramental needs of our school community.

....

Every year hundreds of young Catholics and their families turn to West Catholic for an atmosphere that encourages EXCELLENCE, INVOLVEMENT AND SPIRITUAL GROWTH AS A WAY OF LIVE. [sic] *Exhibit 24* at 1. (emphasis added)

38. Furthermore, the "Coordinator of Religious Activities" is not segregated from the day-to-day activities of the students, but an integral part of student life:

It is widely recognized that Catholic schools are to be communities of faith in which the Christian message, the experience of worship, community and social concern are integrated in the total experience of students, their parents and members of the faculty. (National Catechetical Directory)

The primary purpose for the existence of West Catholic High School is the total Catholic Christian education of



its students. It is the duty of the Coordinator of Religious Activities to oversee *this most important work of the Church* in as many areas of student life as possible. The Coordinator of Religious Activities is an example of the Good News of Jesus Christ and is a living witness of the Christian life style.

*The Coordinator of Religious Activities provides a continuity by being an extension of the parish in the school community. This person will work in conjunction with the priests and the DRE/Youth Minister of the parishes for the purpose of high school student involvement in the parish where possible. In addition and in as far as possible this person will be visible for the events which involve student life or activities, whether of a spiritual, academic, social or athletic nature.*

From this office come the coordination of spiritual exercises, including:

- All-school Masses
- Class Masses
- Sacrament of Reconciliation
- Special Paraliturgical services
- Retreat arrangements
- Faculty Faith Days
- Religion class speakers

In this way, the precious heritage of faith which is taught and professed is expressed in worship.

Sister Leorita Huver, IHM  
Coordinator of Religious Activities

*Exhibit 24* at 2. (emphasis added); see *Exhibit 23* at 23-25.

39. Jim Chesla, a Shared Time instructor in "Math Topics" (a remedial course in mathematics), testified that in each

classroom there is a speaker that is used for morning prayer as well as for public announcements. The speakers must be turned off in the Shared Time classes. *Testimony of Jim Chesla; Exhibit 21* at 11-4, ¶1.

40. Deacon Dale Hollern, Principal at Catholic Central High School, states in the Introduction to the 1981-82 and 1982-83 Curriculum Guides that "Catholic education is unique, since its very foundation was established from the teachings of our Divine and all Supreme Teacher, Jesus Christ." *Exhibits 21 and 22*. Of the twenty-one units that are required for graduation, four must be in Religious Education. *Exhibit 21* at 3; *Exhibit 22* at 3.

41. Out of 909 students enrolled at Catholic Central during the 1981-82 school year, 877 (over 95%) are Catholic. *Exhibit 34*. Out of forty-six Assistant Principals and teachers, forty-one are Catholic. *Id.* The Curriculum Guides for the 1981-82 and 1982-83 school years require that students complete four years of daily attendance in a Religion class. *Exhibits 21 and 22* at 3. Those students "who can clearly demonstrate that they are active members of an established religion other than Catholic" may arrange to receive religious instruction in their own church. All students must receive religious instruction regularly and "progress reports" must be submitted to the Principal of Catholic Central. *Id.* Mr. Hollern testified that the six or seven students who have availed themselves of this exception have complied with the directive. Thus, even among the 5% of students who are non-Catholic, nearly all are participating in the Catholic religious program.

42. Mr. Hollern further testified that the statements about the Coordinator of Religious Affairs articulated in the Curriculum Guide are an accurate portrayal of the philosophy of the school. *Exhibit 21* at 11-4. Because of its importance



in describing the religious environment of Catholic Central, it is reported here in its entirety:

It is widely recognized that Catholic Schools are to be communities of faith in which the Christian message, the experience of worship, community and social concern *are integrated in the total experience of students, their parents, and members of the faculty.* (*National Catechetical Directory*)

In fulfilling *this directive of our American Bishops* it is of primary importance that the School provide a spiritual ministry for the students, their families and the staff. We have a Religious Sister appointed to our administrative staff whose task is to plan, direct and coordinate the religious affairs of the school. This Sister, known as the Coordinator of Religious Affairs, works closely with the administration of the school and the Religion Department to provide a favorable spiritual, psychological and pedagogical environment for the students and staff.

Specific duties of the Coordinator will include:

- 1) leading morning prayer over the public address
- 2) arranging for priests to come to the school:
  - to celebrate the Sacraments of Eucharist and Reconciliation
  - to speak to student groups/religion classes
  - to provide spiritual counseling
  - to meet with parish youth on site
  - to participate in school activities
- 3) preparing for All-School Masses
- 4) scheduling individual Class Masses
- 5) making available retreat opportunities/days of recollection

- 6) planning Community of Faith Days for staff
- 7) participating in Religion Department meetings
- 8) visiting the hospitalized/homebound
- 9) developing means of fostering religious vocations

We consider the above spiritual ministry of the school of paramount importance to the attainment of the spiritual objectives of Catholic Central High School. *Id.* (emphasis added).

43. Documents such as the *National Catechetical Directory* and *To Teach as Jesus Did* that have been previously discussed are used as a "foundation for curriculum building". *Exhibit 21* at 11. The description of objectives and religion courses in the catalog establishes that religious education at Catholic Central is not merely a disinterested look at the teachings of the Catholic Church, but a matter of religious faith and commitment. An overall description of the Religion Department at Catholic Central can be found in the Curriculum Guide. *Exhibit 21* at 11 to 11-4.

44. Exhibits 37 through 41 are resumes of five members of the Board of Directors of the Catholic Interparochial High School. Some of the resumes contain a short paragraph expressing the Board member's educational philosophy. Robert E. Agents, for example, asserts that:

A Catholic education should focus on three goals. *First, it should develop a greater understanding in the student of his or her relationship to God.* Second, it should instill self-discipline in the student and heighten the students self-respect and respect for other persons. Third, it should provide the best possible education for the student. This final goal should be a mixture of the basic educational needs of the student, while at the same time afford the

student with a wide range of future educational and/or employment options. *Exhibit 39* (emphasis added).

Mary R. Robach expresses her "Philosophy of Catholic Education" in these words:

I believe strongly in Catholic Education. I know that we as parents are the primary educators of our children especially in their Religious training. The school backs up and supports us in this duty. The whole atmosphere at a Catholic School in every subject is of prime importance. Religion is not just a class they take, it is a total way of life that can be taught our children best in a Catholic School. *I do not want my children to be taught a secular Religion in a Public School. I want them to be taught the Catholic Religion in a Catholic School.* *Exhibit 41* (emphasis added).

The opinions of Patricia Ryan (*Exhibit 37*) and Thomas J. Lewkowski (*Exhibit 38*) express similar sentiments.

45. The organic relationship of the Catholic high schools to Catholic Church hierarchy is found in the "Articles of Association" of the Catholic Interparochial High School Association revised and adopted on October 22, 1975. *Exhibit 44*. Article III of this exhibit reads:

The purposes for which the Association is formed are as follows:

To establish, build, maintain, conduct and operate Catholic high schools within or adjoining Kent County, Michigan, for the benefit, welfare, and education of secondary school children in said schools, all in accordance with the requirements of the National Compulsory Education Act and the applicable laws of the United States, the State of Michigan

and any other governmental bodies which have jurisdiction, *and subject to the direct or indirect jurisdiction of the Bishop of the Roman Catholic Diocese of Grand Rapids*, and to buy, sell, hold, lease, own, occupy, manage and control real estate and personal properties and funds which may be needed for the foregoing purposes, all without profit to any of the members thereof. (emphasis added).

46. Article VI provides that "[m]embership in this Association shall be limited to the Bishop and Auxiliary Bishop(s) of the Roman Catholic Diocese of Grand Rapids; the priests and religious located in or adjoining Kent County, Michigan which the Association serves, and lay persons registered in parishes located in or adjoining Kent County, Michigan, which this Association serves." Article XIV of the Bylaws of the Board of Directors of the Catholic Interparochial High School Association provides that any act of the Board of Directors may be vetoed by the Bishop of the Roman Catholic Diocese of Grand Rapids. *Exhibit 45* at 8.

47. The Bylaws of the Board of Directors of the Catholic Interparochial High School Association (*Exhibit 45*) provides in Article II for a Board of Directors of seventeen members consisting of the following:

The Bishop of the Roman Catholic Diocese of Grand Rapids or his representative

Five Catholic Priests

One Dominican Sister of Marywood

One from the School Sisters of Notre Dame

Nine lay men or women elected from the parishes which pay assessments to one of the two Catholic High Schools

48. Deacon Dale Hollern testified that all nine lay members of the Board of Directors of the Catholic Interparochial



High School Association are Catholic. The remaining eight are members of the clergy or members of religious orders of the church. All seventeen current members of the Board of Directors are Catholic by religion.

49. Article XIV of the Bylaws of the Board of Directors of the Catholic Interparochial High School Association (*Exhibit 45*) gives to the Bishop of the Roman Catholic Diocese of Grand Rapids a right of veto over any act passed by the Board of Directors. Article XVI provides that the Bylaws shall become effective only after written approval thereof by the Bishop of the Roman Catholic Diocese of Grand Rapids.

#### B. The Christian Schools

50. Bylaws governing the six schools of the Grand Rapids Christian School Association were admitted as Exhibit 77. The doctrinal creed of the Association appears on the first page:

*Section 1.3 Basis.* The supreme standard of the Association shall be the scriptures of the Old and New Testament, herein confessed to the the [sic] infallible Word of God, *as these are interpreted in the historic Reformed confession: The Belgic Confession, Heidelberg Catechism, and Canons of Dort.*

Acknowledging that that [sic] these Scriptures, in instructing us of God, ourselves, and God's creation, contain basic principles authoritative and relevant for education, we hold that:

- (a) The authority and responsibility for education [sic] children resides in the parents or guardians of the children and not in the state or the church. Parents, however, may delegate their authority to those who can competently carry out this God-given parental right.

- (b) The primary aim of a Christian parent is [sic] securing the education of his child should be to give him a Christian education—that is, an education whose goal is to equip the child for living the Christian life as a member of the Christian community in contemporary society.
- (c) Christian parents, when delegating the authority for educating their children, should delegate it to those institutions which seek to provide Christian education for the student.
- (d) The responsibility for maintaining such institutions rests on the entire Christian community.
- (e) The Christ proclaimed in the infallible Scriptures is the Redeemer and Renewer of our entire life, thus also of our teaching and learning. *Consequently in a school which seeks to provide a Christian education it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-prevailing force in the educational program.* (emphasis added).

It is undisputed that the application form for admission to the Christian School Association requires the parent either to subscribe to the Basis or to agree to have his Children taught according to the Basis principles. *Exhibit 68.*

51. In the Agreement of Consolidation of the Grand Rapids Christian School Association, admitted into evidence, the purpose for which the corporation was formed is as follows:

To acquire, establish, maintain and operate Christian schools furnishing primary and/or secondary education; to grant diplomas to its students who merit the same; to determine and establish curricula in which instructions shall be based upon the infallible Word of God *as interpreted by the Reformed faith*, together with courses of



study as may be approved or specified from time to time by the Board of Trustees; to determine the qualifications of and to hire faculty and administration staffs; to select, acquire and furnish textbooks, educational materials, supplies and equipment; to plan and provide for the expansion of Christian Education in the schools which it controls, and to acquire by purchase, gift or otherwise, such real and personal properties as may be necessary or advisable to promote and carry out the objects of this corporation. *Exhibit 76 at 2 (emphasis added).*

Clearly, the importance of the "Reformed faith" is paramount in the Christian schools. The Bylaws and Consolidation Agreement govern the operation of the schools within the Grand Rapids Christian School Association, including Grand Rapids Christian High School, Creston-Mayfield Christian School, Millbrook Christian School, Oakdale Christian School, Seymour Christian School, and Sylvan Christian School. *Testimony of William Gritter.*

52. The Bylaws of the Grand Rapids Christian School Association provide in Section 2.2 the qualifications for membership in the Association. A person must be 18 years of age or older, must be a financial contributor to the Association or have one or more children attending a school of the Association, and must subscribe to the "Basis" set forth in Section 1.3 of the Bylaws (quoted above).

53. This "Basis" recites in specific terms the religious doctrine which members of the Association are required to accept. Clearly, it is Christian theology of a very restricted character. Indeed, this Association, which restricts membership to those who subscribe to the "Basis" which is spread upon the first page of its Bylaws, itself satisfies the definition of a church, being "a body of Christian believers having the same creed, rites, etc."

54. William Gritter, Superintendent of Schools of the Grand Rapids Christian School Association, testified as to the close identity between trustees of the Association and membership in the Christian Reformed Church. This testimony was elicited in an effort to prove that the Christian Reformed Church effectively operates and controls the schools of the Association. Whether or not that is strictly true, it is clear that the Association itself could be considered a church in the definitive sense.

55. Superintendent William Gritter testified that all current members of the Board of Trustees of the Grand Rapids Christian School Association are members of the Christian Reformed Church. These 12 trustees have general authority, power, and responsibility with respect to the educational policies of the six schools operated by the Association. *Exhibit 77 at § 6.1 of Bylaws.*

56. Each of the six schools of the Association has a separate, local board which is advisory to the Board of Trustees of the Association. *Exhibit 77 at § 5.3 of Bylaws.*

57. Trustees of the Association and members of the local boards of the six schools are elected by members of the Association, who may be parents of children enrolled in the schools. However, a person may be a voting member of the Association without having children in any of the schools of the Association. *Exhibit 77 at § 2.2 of Bylaws.*

58. Exhibits 67, 69, 70 and 71 list the incumbent board members and all persons who were candidates for any of the Christian School Boards during the past three years. Analysis of these reveals that there were a total of 127 candidates nominated for the six local boards in the past three years. Of these 115, or 91%, were members of the Christian Reformed Church. Another six, or 5%, were members of the

Reformed Church in America. The remaining six nominees were members of other Christian churches.

59. There were seventy of these nominees elected to the local boards of these six Christian Schools. Of these, sixty-four were members of Christian Reformed churches and three of Reformed Churches in America. Thus 95.7% of the incumbent members of the local boards are members of the Christian Reformed Church or Reformed Church in America. *Exhibits 67, 69, 70 and 71.*

60. The three-year enrollment history by church denomination contained in Exhibit 72 establishes that for the past three school years, 88% of the student body of the Grand Rapids Christian School Association has belonged to the Christian Reformed Church or the Reformed Church in America.

61. In the handout for Grand Rapids Christian High School, it states that the "administration and staff are committed to providing quality, God-centered education in an atmosphere where Christian virtues are emphasized. . . . Christian High School's goal is to give students an education that is Christian. Students are encouraged to develop values grounded in the knowledge of their relationship to God, to themselves, and to their fellow human beings. In an environment that reflects Christian commitment, the school promotes worthy scholarship, serious effort, and a desire to develop God-given abilities to full potential." *Exhibit 64 at 1.*

62. Kenneth Zandee, who is a Shared Time physical education instructor at Grand Rapids Christian High School, testified that in his other capacity as coach of the Christian High School basketball team he conducts a prayer before each game. Mr. Zandee is a member of the Christian Reformed Church and, as a parent of children enrolled in the Christian Schools, has subscribed to the "Basis". *Testimony of Kenneth Zandee.*

63. The handouts for the Oakdale, Sylvan, Seymour, and Millbrook Christian Schools state that they teach their students that

The Bible is the infallible and inspired Word of God

Jesus Christ is Lord of all Creation

Service to others is required of all who believe in Jesus Christ

Each person has talents given by God to develop and use to their full potential. *Exhibits 60-63.*

64. The handout describing Creston-Mayfield Christian School's attitude toward religion states that its "school board and staff are committed to providing quality, *God-centered education in the Calvinistic, Reformed tradition.* . . . Creston-Mayfield's students come from many different denominations. Christian parents who express their commitment to Christian education are welcome to enroll their children. They will be accepted without regard to *race, color, national or ethnic origin.*" *Exhibit 59 at 1 (emphasis added).* "Religion is conspicuous by its absence in this and all other Christian School handouts. *Exhibits 59-60.*

65. Among the "Basic Principles" in the handout are the following:

1. The Bible is the inspired and infallible Word of God.

2. God is triune, Father, Son, and Holy Spirit.

3. Jesus is God the Son. He was born of the Virgin Mary, died on the cross for our sins, ascended to heaven and is someday coming again.

4. Jesus Christ is Lord of our personal lives and the universe in which we live.



5. The Bible is the foundation of our philosophy of Christian education.

6. Each child is a unique image-bearer of God and possesses talents and abilities which must be developed to his or her potential.

7. Primary authority and responsibility for educating children rests with parents, not with the state. *Exhibit 59 at 1.*

66. In an open letter to parents in its 1981-82 Handbook, the Administrator of Creston-Mayfield Christian School stated the following:

September, 1981

Dear Parents,

You have decided your children should be educated in a Christian School. This decision was an important one not only because of the large financial commitment but because it meant you wanted your child educated from a particular Christian point of view.

The school board and staff of the school are committed to the proposition that Jesus Christ is Lord of all creation. This means that He is Lord of our classroom, Lord of our homes, Lord of the world of work, and Lord of our leisure time. We are mandated by Him to care for His world. To us that means applying Biblical truth to social problems, economic problems, political problems, and environmental problems.

With this purpose before us we educate His children. Let us be sure we do not confuse this purpose with winning souls for Christ. Oh, we want our children to know Jesus as Lord of their life, but the school's *primary* function is to teach children to be caretakers of the Master's kingdom.

With this purpose in mind I have prepared this handbook. A Christian community united in purpose can best accomplish its task if the guidelines are clear. I hope you will review it and discuss it with your children. It is my prayer and the prayer of our entire staff that this year may be a blessed one for you and your children. The staff of Creston-Mayfield pledges their support to you in your task as parents. We covet your support and prayers as another school year begins.

Sincerely, In His Service,

/s/

Roger Roskamp

*Exhibit 52 at 1 (emphasis in original).*

67. Various officials of the Grand Rapids Christian School Association, particularly Mr. William Gritter (Superintendent of the Association) and Mr. Ronald Boss (Principal of Oakdale Christian School) have not disavowed any of the statements of philosophy or purposes concerning the religious mission of the Association that are contained in the exhibits discussed so far. As a matter of fact, the Christian School Association has gone out of its way to publicize the sectarian character of its member schools. Consider Exhibit 65, for example. This is an advertisement placed in the Grand Rapids Press by the Grand Rapids Christian School Association containing the banner headline, "CHRISTIAN SCHOOLS BELIEVE THAT GOD MADE EVERYTHING". It continues: "That's why they see Him in MATHEMATICS . . . and HISTORY . . . and SCIENCE and ENGLISH -- and all the other subjects they teach." It is difficult to conceive of a more pointed reference to the Association's philosophy of integrating religion into the curriculum than this. A specific application of this principle is explained in the April 1980 "Newsletter" of the Grand Rapids Christian School Association in a short article entitled, "A Special Project":



After studying the human body for an entire semester, the seventh graders at Millbrook worked on a project to bring together all they had learned.

Mr. Brower and Mr. Sweetman provided each team of students with a large piece of paper on which they traced an outline of their own body. They then began the task of selecting organs and systems to add to this outline. After research into the size, shape and color of the organ, they cut it out of construction paper and glued it to their outline. Students were frequently surprised to find that their first estimate of the size of a particular body part was very far from correct. Upon looking at "George", our anatomical model, and feeling their own body, they soon discovered how to proportion the various organs.

This project proved to us the truth of Psalm 139:14; "Thank you for making me so wonderfully complex! It is amazing to think about. Your workmanship is marvelous — and how well I know it." *Exhibit 75* at 3.

68. In a thirty-minute television program sponsored by the Grand Rapids Christian School Association and aired on WOTV April 20, 1982, the Association took special care to emphasize the fundamentally religious mission of the Christian Schools. The following paragraph is merely illustrative of the type of commentary that permeates the program:

Mr. Bolton [Narrator]:

*Obviously the teacher in this class shares the values of the parents in these children's homes, and the lessons taught here each day are the same ones that the students learn in church and at home.* With things like opening in prayer and an hour of Bible study everyday are not the primary reasons parents spend thousands of dollars to send their

children to Christian Schools. *At the heart of Christian education is a commitment to Jesus Christ. Parents see the world from that perspective and they want their children to be taught that same vision. The school is a partner with the home and the church in teaching the values, the attitudes, the ideas and the goals that Christian commitment demands.* In every part of the learning process, in every class, in every activity, children are taught to keep Jesus Christ at the center of their lives. Teachers in these schools know they are molding young lives, not only for decades but for eternity. *Exhibit 82* at 2 (emphasis added).

(It is worth noting that Mr. Gritter testified that parts of the program were planned and rehearsed—cue cards were used, for example. As such, it effectively amounts to an official statement of the Association. *Exhibit 83*, in fact, is an advertisement placed by the Association on the eve of the "television special" to call attention to its fund drive.)

69. Teachers, administrators, and students share the belief that God is not separable from the classroom. As one teacher, Carole Barber, put it:

Our whole philosophy of our Christian living is based on what we teach the children and so forth. We're preparing the children for a Christian life in a community in a contemporary world, and everything that we do has to be based on Scripture, and values and morals that I teach will be based on Scriptures, and I think that can be intertwined in everything that I teach—very specifically in Bible lessons, of course, and Devotions, but we're teaching the children love and patience and kindness and so forth, and I guess I feel that that has to be their whole outlook on life and that's intertwined in everything that we do. *Exhibit 82* at 2-3.

And Teacher Connie Vanderwell:

I would hope that we're not just teaching for education, but we're teaching for the whole child—for his spiritual development, for his social development and, of course, for the academic development and we hope that that will have a long-range lasting effect on the student. *Id.* at 3.

The ensuing exchange between the Narrator and several students reads as follows:

MR. BOLTON: This is what students told me about attending a Christian School:

STUDENT: A good atmosphere for me to be in and *everybody has the same mutual belief in how to live their lives and we all believe in the Christian faith and so we can talk about it with each other.*

STUDENT: Oh, because it's Christian and I learn lots of things in the school. I learn some hard things and it's kind of a challenge and to see if I can do everything.

MR. BOLTON: Do you think going to a Christian School is better than, say going to some other school?

STUDENT: Yeh.

MR. BOLTON: Why?

STUDENT: Because you learn about God and you wouldn't learn about God in like public schools or anything.

MR. BOLTON: You like to learn about God?

STUDENT: Mm. Mh. *Id.* (emphasis added).

70. The Parent and Student Handbook for Oakdale Christian School reiterates the "Basis" of the Grand Rapids Christian School Association. *Exhibit 46* at 1. Of the 18 full-time teachers at Oakdale, 16 are Christian Reformed, 1 is Pentecostal, and 1 Episcopalian. *Testimony of Ron Boss (Principal of Oakdale Christian School)*. Mr. Boss also testified that 9 of the approximately 220-240 students come from the Reformed Church. The balance comes from the Christian Reformed Church. He agreed that the first and last pages of *Exhibit 46* accurately reflect the philosophy at his school.

71. Seymour Christian School's Staff and Parent Handbooks reiterate the "Basis" that is found in the Bylaws of the Christian School Association and list seven characteristics of "A Christian Teacher," two of which follow:

1. A Christian teacher is first of all a servant of his Lord and Savior. His concepts of God, man, and the world find their authority in the Bible. *His doctrinal stance requires that he interpret his subject matter from a Christian point of view.* His emotional maturity, intellectual competency, and spiritual vibrancy is obvious. His task is to teach God's children about God's world in the light of God's word.

....

3. The Christian teacher sees his students as image bearers of God who will be active in His Kingdom now and forever. He will use every means available to give his students this perspective. He will be a living example of Christian behavior. *He will conspicuously teach Christian virtues.* He will promote a Christian sense of values in his classroom by teaching respect for authority, respect for the property of others, desire to cooperate, enthusiasm for work, concern for others,

and most importantly, submission to the Lordship of Christ. *The teacher will be sensitive to his student's academic and spiritual needs. Exhibit 47 at 7 (emphasis added).*

The Parent Handbooks of Sylvan and Millbrook Christian Schools also reprint verbatim the "Basis" for Christian Schools. *Exhibit 49 at 3; Exhibit 50 at 6. See Exhibit 77 at §1.3.*

72. The Grand Rapids Baptist Academy comprises five facilities in the greater Grand Rapids area. None of these par-takes of the Shared Time or Community Education classes offered to them by the Grand Rapids Public Schools. Mr. George Berends, Executive Director of the Grand Rapids Baptist Academy, testified that the Board of Trustees rejected the offer of the public school classes because it felt that the Academy teachers would not be able to carry out their religious mission. To enroll, a student's parents must be "born again," commit their lives to Jesus Christ, and be faithful in church attendance. Mr. Berends testified that the primary purpose of the Baptist Academy is to let students know God. All classes contain some elements of religion. *See Exhibit 9 at 7-11.*

73. On redirect examination, Mr. Berends agreed that the following sentence, drawn from the "Basis" that can be found in every Christian School publication, accurately represents the philosophy of the Baptist Academy:

Consequently in a school which seeks to provide a Christian Education it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-pervading force in the educational program. *Exhibit 77 at §1.3(e). Also Exhibits 51 and 52.*

Consequently, although Grand Rapids Baptist Academy has the same philosophy of integration of religion into the classroom as the Christian, Catholic and Lutheran Schools, the Executive Director felt compelled to reject Shared Time classes because they would conflict with the Academy's religious mission. The Intervenor-Defendants have sought to characterize the Grand Rapids Baptist Academy as a uniquely sectarian institution; however, the preceding testimony of Mr. Berends establishes that the Academy's philosophy of intergrating religion into the classroom is similar to that of the Christian Schools and other religious schools.

74. Although West Side Christian School is not a member of the Grand Rapids Christian School Association, it adheres to the same tenets of the Reformed faith. The opening paragraph of the "Statement of Purpose and Basis of the West Side Christian School" reads:

West Side Christian School has been established, as the constitution states, "to maintain a Christian school for the instruction in the subjects of elementary and junior high school grades." The constitution states, "*The basis of the Society is the Word of God as interpreted by the three forms of unity: The Belgic Confession, The Heidelberg Catechism, and The Canons of Dort. Thus being committed to the Reformed World and Life View, the educational principles of the Society must, therefore, be distinctively Christian in emphasis and character.*" *Exhibit 7 at 1 (emphasis added).*

The underscored portion of the preceding quotation is identical in all essential respects to the "Basis" of the Grand Rapids Christian School Association. *Finding of Fact 50; Exhibit 77 at §1.3.* Furthermore, these statements "are the foundation for the Basis, Authority and Purpose of our Christian Education." *Exhibit 7 at 1.*



75. The "Basis", "Authority", and "Purpose" are explained as follows:

*The Basis* and standard of the West Side Christian School shall be the Scriptures of the Old and New Testament, *confessed to the infallible word of God as these are interpreted in the historic confessions.*

*The Authority* and responsibility for educating children resides in their parents or guardians. Within this responsibility, parents may delegate this authority to West Side Christian School to carry on the education process in accordance with the above-stated basis. The right to exercise discipline is then also delegated to the school, while the parents retain the right to discuss matters of discipline with the faculty and administration, and may appeal to the school board for final disposal of differences of opinion when all other means to achieve agreement have been exhausted.

*The Purpose* of Christian Education at West Side is to provide a God-centered education to children of Christian parents and no child of Christian parents shall be denied admission *on the basis of race, color, sex or national origin.* In order to provide this education for our children, *all aspects of education must be permeated with a Christian perspective, based on the Word of God.* *Id.* (emphasis added).

76. The remainder of the handout for West Side Christian School, indeed the entire description of the school, emphasizes the commitment and vigor with which religion is incorporated into the daily life of the students. *Id.* at 1-2. Ending with three verses from the Bible, the handout provides space for the parent to acknowledge and concur with this commitment to Christian education: "I have read these statements and

concur that my child/children should be educated according to these principles and ideals as stated." *Id.* at 2. By requesting parents to submit to the principles in the Statement of Purpose and Basis, West Side Christian School has restricted admission based upon adherence to a particular religious faith. Indeed, the application for admission requests the family's church affiliation, attendance record at church, and a brief essay stating the reasons why the parents want their child "to receive a Christian Education." *Id.* at 5. The form does not ask why the parents want to attend the West Side School; it asks the transcendent question of why they want their child to receive a Christian education.

### C. The Lutheran Schools

77. The Lutheran schools that have accepted Shared Time classes are described by reference to Exhibits 12-18 and the testimony of Kraig Johnson, Principal of Immanuel-St. James Lutheran Schools. These schools are located on sites which also contain Lutheran churches. As to the religious affiliation of the school staff, Mr. Johnson, his Assistant Principal, and the Secretary (who is employed by the Lutheran Church) are all Lutheran. All five of the teachers are Lutheran. The joint school board (three lay members apiece from St. James and Immanuel Churches) is Lutheran. Mr. Johnson testified that only 1/6 to 1/8 of the student body is non-Lutheran. *Testimony of Kraig Johnson.*

78. Mr. Johnson testified that non-Lutherans may attend Immanuel-St. James as freely as Lutherans. The handouts and brochures that are passed out to those interested in the school, as well as Mr. Johnson's own testimony, contradict this point of view. The literature available to parents interested in Lutheran Schools is incorporated into a packet and sent to them. *See Exhibits 12-18.*

79. The religious flavor of the Immanuel-St. James Schools is evident throughout the handbook describing their programs and philosophy, beginning with this: "Immanuel-St. James School is not a private affair. It does not belong to teachers, or parents, or children, or voters' assemblies. Immanuel-St. James Lutheran School is God's. It is God's mission." *Exhibit 18* at 3. The Immanuel-St. James "Credo on Christ Education" integrates these beliefs into the education of the students:

WE BELIEVE that Christian education is a vital aspect of the Church's mission, commanded by God through the Great Commission.

WE BELIEVE that Christian education is directed toward the total development of people, providing for their spiritual, intellectual, emotional, social and physical needs.

WE BELIEVE that Christian education is a responsibility of all believers toward all people.

WE BELIEVE that the purpose for Christian education is to teach the Christian faith through

(a) instruction in God's word

(b) living in relationships of love and forgiveness.

WE BELIEVE that an effective program of Christian education is based on a distinct theology and determines its curriculum by taking into account current world conditions.

WE BELIEVE that effective education is achieved as quality learning programs relate the Christian faith in every aspect of life.

WE BELIEVE that the family exerts much influence on a child's total education, and that the church must equip adults for their important role in Christian education. *Id.* at 5 (emphasis added).

80. There are five "distinctive features" of Immanuel-St. James which characterize the school:

1. GOD AND HIS WORD ARE CENTRAL

*The Holy Bible influences all lessons and activities in our Christian Day School. Through Scripture the Holy Spirit works to increase the child's understanding of himself, his purpose, his destiny, and his Lord.*

2. THE CHILD RECEIVES THOROUGH, SYSTEMATIC INSTRUCTION IN THE TEACHING OF CHRISTIANITY

Christian teachers lead the child in daily study of God's word and in prayer and worship. Particular attention is given to clarifying the story of sin and salvation. *In addition, the pupil is trained to practice his Christianity.* Guided by teachers and fellow pupils, he grows in Christian knowledge, attitude and conduct.

3. THE CHILD RECEIVES A THOROUGH TRAINING IN THE COMMON SCHOOL SUBJECTS

The child is instructed in all the common school branches of learning, as prescribed by the state. *But all such instruction is given from a Christian point of view. The child is thus protected from the dangers of a purely secular schooling.*

4. THE CHILD LIVES IN A CHRISTIAN ENVIRONMENT

The devil constantly seeks to undermine the Christian's faith. The importance of school environment, therefore, is not to be underestimated. True, misunderstandings and incidents of misbehavior and con-

flict will occur in this school also . . . But the power of sin is lessened when Christian teachers and children live in intimate relation with their Lord, and in loving concern for one another's growth in holy living.

## 5. THE CHILD GROWS INTO HIS CHURCH

More and more active workers in the local congregation and in the church at large are needed. Leaders, pastors, teachers, and lay persons—must be developed to guide the church's work. Members who remain faithful to the Lord, and who are wise stewards of their time, abilities, and possessions, are essential. *Immanuel-St. James Lutheran School trains children for just such roles. Exhibit 18 at 6 (emphasis added).*

81. Despite the attempt by Mr. Johnson to disassociate his school from any religious restrictions on admission, the fact remains that preference is given to Lutherans. As the "Admission Policies" state:

7. Members of the sponsoring congregations are given first opportunity to enroll their children. Children of non-member families are accepted on the following basis and availability of space:

- a. Children from sister congregations;
  - b. Children from other Lutheran churches;
  - c. Children from other Christian churches;
  - d. And others who desire a Christian education.
- Exhibit 17 at "Admission Policies."*

The religion affiliations of both the parents and student are requested on the application for admission. *Exhibit 17.* Furthermore, the schools' disavowal of discrimination on the basis of "race, color, national and ethnic origin" conspicuously omits religion. *Exhibit 18 at 9, ¶10.*

82. Even more significant, however, is the following paragraph from the Immanuel-St. James policy handbook:

Confirmation classes, which have traditionally been a part of the seventh and eighth grade curriculum, will be held two mornings out of the week for those who anticipate membership in our congregations. *Non-member children are to attend the classes to achieve greater understanding of the Gospel as understood by the Lutheran Church—Missouri Synod. Id. at 8 (emphasis added).*

Teachers at Immanuel-St. James Lutheran School "meet all the requirements of Synod for it's [sic] parochial school teachers and the requirements of the State of Michigan, Department of Education." *Id.*

83. The pamphlets publicizing Immanuel-St. James are replete with examples of the interconnection between the school and religion. One finds that the "entire curriculum [sic] is fraught with Christian lifestyle, beliefs, and values." *Exhibit 13.* The "program of Christian education [is] based on the conviction that learning and living take on meaningful dimensions only when related to Christ." *Exhibit 16 at 1.* "[A]ll subjects are taught with a Christian approach and from a Christian point of view." *Exhibit 18 at 8.* "In keeping with the purpose of the school, the Bible forms the core and center upon which all instruction is based. Religious instruction in Scripture, Bible stories, prayers, and daily devotions form part of each day's program. As pupils progress through the grades, systematic study of the Bible, the chief Christian Doctrines, prayers and hymns help to make religion part of the young Christian's life." *Id.*

84. The goals of "Lutheran elementary education" are similar to sound public elementary education,



But it seeks to do this inside a different framework. Basic to a total education, we believe, is the development and growth of a spiritual outlook. This involves:

1. Leading the child to faith in the Lord Jesus Christ, and keeping him/her in that faith to eternal life in heaven.
2. Helping the child in Christian growth in all relationships of life, such as the family, the Church, the State, the relationship of friendship, of employment and labor, of art and culture.

These goals relate not only to this life, but to the world to come. They seek to lead the child along his/her earthly ways, through death, and into the eternal glories of heaven.

The Lord commands Christian parents to provide this care for their children's temporal and eternal welfare. At the same time the Church must seek the best means available to train its young. It has found this in the Christian day school. Here the total child can be trained to be a citizen of both earth and heaven. *Id.* at 4.

85. The Immanuel-St. James School staff keeps "attendance records" on church and Sunday school attendance "with the hope of encouraging regular attendance. Families of Immanuel-St. James Lutheran School are strongly encouraged to regularly attend their church and educational classes. Perfect church and Sunday school awards are given at the end of the school year." *Exhibit 18* at 15.

86. Lutheran schools are different in that the students "exhibit a more consistent belief in the divinity of Jesus," "do more witnessing to others about Christ," "are less swayed by their peers," among other attributes. *Exhibit 14*. A series of testimonials by parents of Lutheran school students reinforces

the school's official policy of combining the word of God with the learning environment. *Exhibit 15*. A brief "newsletter" mailed by the "Immanuel Lutheran Church and School" states that "Immanuel-Saint James Lutheran Day School was founded on the belief that the church shares in the responsibility of providing a thorough Christian training for all children, while it also strengthens and supports the parents in their efforts." *Exhibit 12*. In the kindergarten through Eighth Grade Day School, a "Christian atmosphere permeates the daily instruction of religion, language arts, math, science, art, music, and physical education." *Exhibit 12*. Significantly, art, music and physical education are *Shared Time* classes there. *Exhibit 90* at Interrogatory #79 and Attachment.

87. The connection between these Lutheran schools and the Lutheran Church is expressed in the handbook:

Immanuel-St. James Lutheran School is supported and run jointly by Immanuel Lutheran and St. James Lutheran Congregations. Our School is one of almost 1200 Lutheran Schools in the United States and one of 110 Lutheran Schools in Michigan.

The responsibility for the educational program at Immanuel-St. James Lutheran School rests in the hands of the Joint Board of Education. The Voters' Assembly of each congregation elects three of its members to serve on the Joint Board of Education. The pastors, principals, and assistant principal are advisory members to the Board. *Exhibit 18* at 7.

## II. EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

88. Throughout the course of testimony in this trial, numerous interconnections between the Shared Time Program and the private religious schools have been established. The follow-

ing seven illustrations of excessive government entanglement with religion include the lease used by the Grand Rapids Public Schools, the means by which the Shared Time classes are desanctified, student body identity, teacher and staff identity, and coordination of Shared Time classes with nonpublic school schedules, political entanglement, and "miscellaneous contacts."

#### A. The Lease

89. The lease is the instrument by which the Grand Rapids Public Schools have gained access to rooms within private religious schools participating in the Shared Time and Community Education programs. It is a standard form that is used by all of the schools leasing space to the Grand Rapids Public Schools. *Exhibit HHH*. John Young, Director of the Shared Time program, testified that he contacts the nonpublic schools that participate in the program to determine which classrooms can be leased. Mr. Young then visits the nonpublic school building for a conference with the Shared Time teacher to see if the room provided is suitable. *Testimony of John Young*.

90. In none of the leases covering the forty-one (41) nonpublic schools, however, is there any mention of the particular rooms or space that the lease governs. During the course of the trial there was much testimony concerning the sites where Shared Time classes are held in a given school building. At Immaculate Heart of Mary, for example, Shared Time teachers and students occasionally use the library and corridors as well as the "regular" Shared Time rooms (the gym and cafeteria). When the teachers and students enter the library (which has not otherwise been designated as a Shared Time classroom), it becomes a "public school" classroom by the very fact of their presence. *Testimony of Sister Mish*.

91. The Grand Rapids Public Schools leases secondary school classrooms for \$10.00 per class per week and elementary school classrooms for \$6.00 per class per week. The amount

that Grand Rapids Public Schools has paid in lease fees to the nonpublic schools for 1981-82 amounts to around \$200,000. *Testimony of Elmer Vrugink*.

92. The lease does not by its terms restrict the Shared Time students or teachers from occupying any of the facilities in the nonpublic schools. Mr. Young's testimony that contacts are made with the nonpublic schools to determine what classrooms are "available" for the shared time classes does not establish whether other rooms are "off limits" or unavailable. Conceivably, rooms could be used that have not been "desanctified", as in the case of the classrooms used by Gwen Prong. Mrs. Prong testified that as a remedial and enrichment reading teacher, she visits various classrooms within West Side Christian School to diagnose the students' reading ability. She further testified that she carried her "public school" sign to rooms that have not otherwise been designated Shared Time classrooms and displayed the sign. *Exhibit EEE*. If she forgets to display it, she continued, her students would remind her. In certain instances, she must cover up religious symbols that are displayed in the non-Shared Time classes she is required to visit for diagnosis. Sister Mish testified that a remedial reading teacher at Immaculate Heart of Mary had to carry and display her sign when going from room to room.

93. There is an unreality to the distinction between the Shared Time classes and the nonpublic school classes that surround them. Both enroll students from the same nonpublic school, take place in the same building as the nonpublic school, and, in many cases, use the nonpublic school teachers and staff. The "public school" classes are public in name only. Substantively they are adjuncts to the private religious schools.

94. The lease is a fiction that turns what otherwise would be a nonpublic school classroom with nonpublic school students into a public school classroom with public school students.



## B. Desanctification of the Shared Time Classes

95. The manner in which the Grand Rapids Public Schools has attempted to desanctify the Shared Time and Community Education classes can be generally summarized as follows: The classrooms are stripped of all religious artifacts and symbols. A sign states that the classroom is leased by the public schools. *Exhibit EEE*. This sign is placed inside the room on a wall; at the Immaculate Heart of Mary gymnasium, for example, the sign is posted on the south wall of the gym.

96. In cases where the Shared Time teacher visits the nonpublic school classrooms for remedial reading, she sets up a Shared Time class in that portion of the nonpublic school classroom by posting a "public school" sign. *Testimony of Sister Mish; Testimony of Gwen Prong*.

97. Upon occasion, some Shared Time teachers use the library of the nonpublic school for their reading classes although these are not designated as Shared Time rooms. *Testimony of Sister Mish; Testimony of Ann Barth*. Sometimes the teacher fails to display the sign and is reminded by her students to post it. *Testimony of Gwen Prong*. Gwen Prong, a Shared Time reading teacher at West Side Christian, testified that in her circuit of reading assignments she had to cover up religious symbols. Asked what kind of reaction that provoked from her students (sixth and seventh graders), she surmised that they figured she was an "atheist" or "strange". *Id.*

98. At West Catholic High School, Jim Chesla, a Shared Time teacher in "Math Topics" (a remedial mathematics course), testified that there is a public address system with speakers in the hallways and classrooms. Public announcements, including morning prayer, are broadcast. The prayers are piped into the classroom, Mr. Chesla added, but not while the Shared Time students are there. *Testimony of Jim Chesla*. Edward Wagner, the Principal at West Catholic, testified that

he oversees the removal of religious artifacts from the Shared Time classes. *Testimony of Edward Wagner*.

99. At certain schools the Shared Time classrooms are not used for any functions of the nonpublic schools in which they are located. Timothy Dwyer of Sacred Heart School and Dale Hollern of Catholic Central High School testified to this effect. At Oakdale Christian School, however, Phyllis Penny, a Shared Time teacher in reading, testified that her class is used by the Christian Learning Center before her Shared Time reading class convenes. The gym at Immaculate Heart of Mary is used for events other than the Shared Time physical education classes, including weddings, basketball, and church-related activities put on by the parish church. *Testimony of Sister Mish*.

100. All Shared Time and Community Education teachers are given "Shared Time Guidelines" that instruct them on the "dos and don't" of injecting religion into their classes. *Exhibit LLL*. Once the Shared Time teacher begins to teach, no discussion of religiously related topics is permitted. Dr. Vrugink testified that once the teachers are supplied the guidelines and instructed not to broach the subject of religion, there is no further attempt to monitor Shared Time teachers or classes for religious content. He added that they "know the rules" of the public schools on this matter, and are adequately forewarned. *Testimony of Elmer Vrugink*.

101. Virtually all of the Shared Time teachers who were witnesses in this case testified unequivocally that there is no monitoring for religious content by their public school employers. Jim Chesla, for example, "Math Topics" teacher at West Catholic, testified that he is supervised and evaluated by William Oosse of the public schools, who observes him several times during the school year for a general evaluation. There is no supervision by West Catholic staff. *Testimony of Jim Chesla*.



102. On an administrative level, William Gritter, Superintendent of the Christian School Association, testified that he and Ronald Cook (the Superintendent of the Catholic Schools) and David Seamon (the Superintendent of the Catholic Secondary Schools) occasionally meet with John Dow, Superintendent of the Grand Rapids Public Schools, and Elmer Vrugink, Deputy Superintendent. The purpose of these meetings is to "facilitate communication between our system". Good communications, he continued, has fostered an educational climate that is a "model" for systems throughout the country to follow. When asked by Plaintiffs' counsel if the group ever discusses the Shared Time program, Mr. Gritter replied that reference is occasionally made to the program.

103. Edward Wagner, Principal and the Coordinator of the Community Education Program at West Catholic High School, testified that the teachers are not monitored specifically for religious content, but as part of an overall observation and evaluation. Similarly, John Jaksa, Principal and a Community Education aide and teacher in the Community Education Program at St. Stephen's School, testified that he meets with an observer from the public schools but does not discuss any issues concerning religion. Mr. Jaksa stated that there is no prayer in the Community Education or Shared Time programs; however, there is prayer in every other class.

104. Phyllis Penny, a Shared Time remedial reading teacher at Oakdale Christian School, testified that she was not monitored at all during 1981-82 by the public schools. She was told at the outset of her work there not to keep any religious objects in class.

105. Kraig Johnson, Principal of Immanuel-St. James Lutheran Schools, testified that the Shared Time Guidelines are followed at the Lutheran Schools.

106. David Bailey, Grand Rapids Assistant Superintendent for Personnel, and Betty Rowlands, Grand Rapids Supervisor of reading, testified that no inquiry is made into the religious affiliation of the teacher or whether religion is discussed in the Shared Time programs. When asked how she could be sure that religion was never injected into the class, Mrs. Rowlands testified that because the Shared Time staff knows that violation of the Shared Time Guidelines is forbidden, it is simply not done.

107. Kurt Mirandette, a Shared Time physical education instructor at St. James, testified that religion is not a factor in his employment there and is not discussed by his evaluator, Joe Leonardo, Assistant Director of Athletics for Grand Rapids Public Schools. Mr. Mirandette finds out when Holy Days of Obligation occur at St. James in order to avert conflict with his Shared Time classes.

108. Catholic elementary schools are located on the same premises with, and adjacent to, parish churches of the Roman Catholic Church. In many instances, as with Sacred Heart and St. Stephen's, the school is physically connected to the parish church. *Testimony of John Jaksa, Timothy Dwyer.* Both Catholic Central High School and St. Andrew's Elementary School are adjacent to St. Andrew's Cathedral in the near downtown, southeast area. *Testimony of Dale Hollern.*

### C. Student Body Identity

109. In every Shared Time and Community Education class in the nonpublic schools, there is complete student body identity between the "public school" classes and the nonpublic schools. In other words, the Shared Time and Community Education classes are filled *exclusively* from the student body of the parochial school within which the classes are held. *Exhibit 90 at Interrogatory 13. Testimony of Elmer Vrugink, William Gritter.* The single exception is a student who attends

a Shared Time industrial arts class at Christian High School with Daniel Visser. *Testimony of Daniel Visser*. This student otherwise attends the Christian Learning Center, which provides education and training for students with learning disabilities. *Id.*

110. Despite the fact that there were over 10,000 students participating in the Shared Time program during the 1981-82 school year, no evidence has been offered by the Defendants that any of the students come from the public schools of Grand Rapids. The Defendants have attached the label "public schools" to Shared Time classes even though the students are drawn exclusively from the private religious schools that participate in the program.

111. The "public school" character of the Shared Time program derives only from the fact that the teachers are paid by the Grand Rapids Public Schools and that the textbooks and teaching materials are supplied by the public schools.

112. Dr. Vrugink, Mr. Young, and others have testified that the Shared Time and Community Education classes are "open" to the community at large. The theoretical availability of these classes to public school students and others is belied by statistics revealing that the "public school" classes consist of private school students only. Dr. Vrugink testified at some length under questioning by Plaintiffs' counsel that basing the Shared Time classes at a public school where they could be attended by both public and nonpublic students would be "far out" and "unreasonable" for those who would have to walk the distance. Mr. Young, in referring to numerous charts (Exhibits JJ(a)-JJ(qq)), testified that an inordinate number of instructional hours would be lost if large numbers of nonpublic school students walked or were bused to the "neutral" sites hypothesized by Plaintiffs' counsel.

113. As a practical matter, therefore, a policy decision of Defendant Grand Rapids School Board has decreed that Shared Time classes must remain at the same site where the students' other classes in the nonpublic school are offered.

#### D. Teacher and Staff Identity

114. In addition to the identity between the student body at the nonpublic schools and the students enrolled in the Shared Time and Community Education classes, there is a great amount of duplication between the teachers and staff in the Shared Time program and the nonpublic schools at which it is offered. In an unusual number of instances, teachers who are employed by a given nonpublic school are also employed by the Grand Rapids Public Schools in the Shared Time or Community Education programs at the *same* school. In other cases, teachers now working in the Shared Time or Community Education programs in certain nonpublic school buildings were previously employed by the nonpublic school at that same building.

115. Based upon testimony and exhibits concerning the Grand Rapids Public Schools' guidelines for Shared Time classes (*see Exhibit LLL*), teachers who work full time in the nonpublic schools, where religion is an integral part of the curriculum (*see Findings of Fact 6-87*), must reverse roles in the Shared Time classes. As employees of the Grand Rapids Public Schools, they must discard any expression of the religious values that are otherwise part of the nonpublic school's reason for existence. They must do this, furthermore, within the same building that offers all of the other classes, including religious studies, that the students must take. In short, the Shared Time classes are filled with students all of whom are also enrolled for all other classes at the private religious school, are conducted by teachers many of whom are present or former employees of the nonpublic school where the classes are held, and take place within the bosom of the nonpublic school.



116. A survey of various nonpublic schools and Shared Time teachers establishes the extent of duplication between the Shared Time and nonpublic school teachers. Sister Mish, the Principal at Immaculate Heart of Mary, testified that her Administrative Assistant, Sister Regina Mary Godell, also runs the Community Education program that is financed by the Grand Rapids Public Schools. This program includes such classes as mathematics, recreational activities, quilting, cross stitching, and computer work, all taught after regular school hours. Sister Mish further testified that *all* of the Community Education classes are taught by 6 or 7 Immaculate Heart of Mary teachers working for the Grand Rapids Public Schools.

117. Jim Chesla has been a Shared Time instructor in "Math Topics" at West Catholic High School since 1980. This is essentially a remedial course designed to help students who have difficulty in mathematics. For the past three years he has also coached girls' tennis as an employee of West Catholic. Immediately prior to Mr. Chesla's employment in the Shared Time program he was employed full-time by West Catholic to teach mechanical drawing, architectural drafting, and some mathematics. This employment lasted from 1975 to 1979. In 1980, Mr. Chesla began to work in the Shared Time program in one of the same areas he had taught at West Catholic—mathematics. He testified that he "does not know" why he was assigned by the Grand Rapids Public Schools back to the same building where he had previously been employed by West Catholic High School. *Testimony of Jim Chesla.*

118. Edward Wagner, Principal of West Catholic High School, is also the "Coordinator" of the Community Education program at West Catholic. According to his testimony, Mr. Wagner wears "two hats"—one for West Catholic and the other for the Grand Rapids Public Schools. The Community Education program takes place immediately before and after the regular school hours at West Catholic. He is paid \$3,000

per year by the public schools. Once or twice per year he meets with John Young, Director of the Shared Time program. The Assistant Principal at West Catholic, Richard Cebelak, is paid \$10.00 per hour to teach a Community Education class at West Catholic High School called Michigan Outdoors. *Testimony of Edward Wagner.*

119. The enrichment classes conducted by the public schools before school begins are taught by teachers some of whom are also employed by West Catholic. *Testimony of Edward Wagner.* Exhibit 93 details the extent of cross-over between West Catholic and its Community Education program in terms of teachers and staff. Twenty of the twenty-four Community Education teachers also teach classes as West Catholic employees. Seven of these teach subjects that are very similar to those they teach as West Catholic employees. Several teachers were hired by Grand Rapids Public Schools who previously worked for West Catholic. Three names mentioned by Mr. Wagner were Timothy Kohane (Shared Time and Community Education), Robert Galvin (Shared Time), and Maurice DeVoe (Community Education Industrial Arts).

120. The Shared Time operation at Catholic Central High School is similar to that at West Catholic. Dale Hollern, Principal at Catholic Central, doubles as a Supervisor of the Community Education program at Catholic Central for the Grand Rapids Public Schools. As an employee of the public schools, he is paid \$9.50 or \$10.00 per hour for work performed during the morning Community Education program, which lasts from 7:45 a.m. to 8:25 a.m. every school day. Part of Deacon Hollern's job consists of supervising the floors where the morning Community Education classes convene. Raymond McCahill, the Assistant Principal at Catholic Central, is employed by the public schools as the "Coordinator" of the "Community Education" program. In addition to his duties as Assistant Principal and Coordinator of the public school programs



at his school, Mr. McCahill coaches basketball for Catholic Central students. *Testimony of Dale Hollern.*

121. Deacon Hollern testified that approximately one-third of the staff at Catholic Central also teaches in the Shared Time program. *Exhibit 92*, however, itemizes the teachers who teach in both the Catholic Central and Shared Time programs. Twenty-three out of the twenty-five teachers (92%) who work in Community Education also work at Catholic Central. Ten of the twenty-three work in subjects that are very similar to, or at least cognates of, the subjects they teach as Catholic Central employees. A closer look at several of these teachers establishes the extent of intermingling between Catholic Central and the Shared Time program conducted there. Elizabeth McKinney teaches "Math Topics" in the Shared Time program at Catholic Central. She is also employed by Catholic Central as a volleyball coach. Matt Rockwood was employed full time at Catholic Central in physical education for three or four years when he became employed in the same subject area by the Grand Rapids Public Schools at Catholic Central. He is also now employed by Catholic Central as a football and baseball coach. Beatrice Johnson is employed by the public schools in Shared Time physical education after having previously worked at Catholic Central teaching the very same subjects. All three of these instructors are Roman Catholic. *Testimony of Dale Hollern.* With respect to these three teachers, Deacon Hollern's testimony directly contradicts the table in *Exhibit 92*, which lists them solely as public school teachers.

122. At Sacred Heart School, Principal Timothy Dwyer testified that the teachers in the Community Education program are drawn entirely from the full-time faculty of Sacred Heart. Sacred Heart's handbook states that "[t]hroughout the year students may enroll in after-school Community Education classes offered by Sacred Heart's faculty." *Exhibit 4* at 6 (emphasis added). Mr. Dwyer himself is employed by the Grand

Rapids Public Schools as a Community Education "Aide" at a rate of \$88.00 bi-weekly. *Testimony of Timothy Dwyer.*

123. The Principal at St. Stephen's School, John Jaksa, testified that he is employed by the public schools as a Community Education "Aide" and teacher at a bi-weekly rate of \$99.00. As an Aide, Mr. Jaksa organizes the Community Education program at St. Stephens: i.e., what teachers, rooms, and students will be available for the sixteen Community Education classes. He also teaches arts and crafts in this program. With only one exception, all of the Community Education teachers are drawn from the faculty of St. Stephen's School. *Testimony of John Jaksa.*

124. The extent of duplication between the Grand Rapids Christian School Association and the Public Schools Community Education program is described by the testimony of William Gritter, Superintendent of the Association, and *Exhibits 57* and *58*. All of the programs listed in the "zero hour" on the class schedules for Christian High School are Grand Rapids Public Schools Community Education with the exception of counseling, study room, administration, library, preparation, and tutorials. *Exhibits 57 and 58; Testimony of William Gritter.* All other classes shown on these class schedules are Christian High School classes. *Id.* Nearly all the instructors who regularly teach as full-time employees of Christian High School also teach the "zero hour" Community Education classes. Indeed, Schrotenboer teaches a Community Education class that is the same topic and in the same room as her Christian High School classes. *Exhibit 58.* Ten of sixteen Christian High School teachers who are also Community Education employees teach "zero hour" classes that are similar to the ones they teach for Christian High, and in the same rooms. *Id.*

125. Daniel Visser is a full-time Shared Time instructor in Industrial Arts at Christian High School. From 1961 to 1977,

Mr. Visser was employed by Christian High School as an Industrial Arts instructor. In 1977 he filled an opening in the same area offered by the Grand Rapids Public Schools in the Shared Time Program and was thereupon assigned by Defendant Grand Rapids Public Schools back to the same building (Christian High School) where he had previously taught as an employee of Christian High School. Following the change of hats, Daniel Visser was back at the same school teaching the same subjects to the same students, but now receiving his paychecks from Grand Rapids Public Schools instead of Christian High School. *Testimony of Daniel Visser.*

126. Kenneth Zandee accomplished the same transition in employment. For about 15 years following graduation from Christian High School and until 1977, Ken Zandee was a full-time physical education teacher at Christian High School. In 1977 he applied for and obtained the position of full-time physical education teacher in the Grand Rapids Public Schools Shared Time program, and he was assigned by Defendant School District to teach at Christian High School. So, as with Daniel Visser, Ken Zandee came back to Christian High School, this time as a public school employee paid from tax funds, to teach the same subject to the same Christian School students. In the transition, Defendant Grand Rapids Public Schools had taken over the boys physical education course at Christian High School, thus relieving the Grand Rapids Christian Schools of the expense of operating that area of its curriculum. *Testimony of Kenneth Zandee.*

127. Ken Zandee also teaches a course called Body Mechanics in the "zero hour" Community Education program conducted by Defendant at Christian High School. Also, he is employed by Christian High School as the Basketball Coach. Thus, Ken Zandee actually wears *three hats*—full-time public school physical education Shared Time teacher, part-time

"zero hour" public school Community Education teacher, and part-time Basketball coach of the Christian High School team.

128. Both Mr. Zandee and Mr. Visser testified that they are members of the Christian Reformed Church, that they have children attending Christian Schools and that they subscribe to the "Basis" statement of the Grand Rapids Christian School Association quoted in proposed Finding of Fact 50.

129. At the remaining Christian schools, at least four present Shared Time teachers have been identified as former employees of the Christian School Association. Randy Commeret, now a Shared Time teacher at Creston-Mayfield Christian School, was previously employed at Christian High School just before working for the public schools. Clare Vredevelde was employed by the Association immediately before becoming a Shared Time teacher at Millbrook Christian School. Norma Bratt works as a Shared Time teacher at her former jobsite, Seymour Christian School. And Dick VanderKamp, who used to teach for Oakdale Christian School, now teaches as a Shared Time teacher at both Oakdale and Seymour Christian Schools. *Testimony of William Gritter and Ronald Boss.*

130. David Bailey, Assistant Superintendent for Personnel at the Grand Rapids Public Schools, testified that the same procedures are used in hiring all Shared Time teachers. When asked whether Kenneth Zandee, Edward Wagner, and Dick VanderKamp (all of whom are employed both by the Grand Rapids Public Schools and the non-public schools where Shared Time classes are offered) were hired in part because they had been employed where the Shared Time classes were being offered, Mr. Bailey testified that he "does not know" whether that was a factor in the overall consideration of them. *Testimony of David Bailey.* John Young, Director of the Shared Time program, testified that Edward Wagner (Principal of West Catholic) would be his "first choice" for Community



Education Coordinator at West Catholic. *Testimony of John Young.*

#### E. Coordination of Classes and Schedules

131. In the 1981-82 school year, the Shared Time and Community Education programs employed 470 teachers, providing services to over 10,000 students, virtually all of whom attend nonpublic schools. *Exhibit 90* at Interrogatories 74, 16, & 64. The cost of these programs exceeds \$3,000,000. Forty-one private religious schools participate in Shared Time and around 1,500 classes are held. *Id.* at Interrogatory #79 & Attachment.

132. In order to coordinate the scheduling of this many teachers, classes, and students, the Grand Rapids Public Schools takes the following steps: First, packets are sent to the nonpublic schools offering Shared Time and Community Education classes. The nonpublic schools, in turn, indicate what classes they wish to accept. John Young contacts the nonpublic schools to determine what classrooms are available for the Shared Time classes. He also confers with the Shared Time teachers to see if the rooms provided by the nonpublic schools are sufficient. *Testimony of John Young.*

133. Second, the scheduling of classes is done by the Grand Rapids Public Schools in conjunction with the participating nonpublic schools in light of these facts: (1) the school years of the public school system and the forty-one nonpublic schools are not necessarily coterminous, (2) the nonpublic schools have religious holidays that are not necessarily recognized by the public schools, (3) the nonpublic school students in Shared Time Classes have other classes, and (4) a strike by public school teachers occurred in 1981-82 disrupting the original schedule. Indeed, the Shared Time program is structured so as to "accommodate" the student

body of the various nonpublic schools. *Testimony of Elmer Vruggink.*

134. Remedial reading teachers in the Shared Time program face problems in scheduling unique to their specialty. Because the nature of this reading program requires that the nonpublic school students be assessed individually, *Exhibit B* at 9, the Shared Time instructors must coordinate their classes with the nonpublic school teachers. For example, Phyllis Penny, who teaches remedial reading at Oakdale Christian School for the Grand Rapids Public Schools, is informed by the nonpublic school teacher of what students will attend her class. Because she does no diagnostic testing, Mrs. Penny relies on the nonpublic school teachers to determine for her the students who will use her services. *Testimony of Phyllis Penny.*

135. Margaret Kroon, a diagnostic and remedial reading Shared Time teacher at Holy Spirit School, selects students for her classes from the Holy Spirit student body. Mrs. Kroon is Roman Catholic. The classroom teacher tests his or her students to determine the need for Mrs. Kroon's reading classes and supplies the test results to her. Mrs. Kroon also administers various tests to diagnose reading problems. *Testimony of Margaret Kroon.*

136. Ann Barth, a Shared Time remedial reading teacher at St. Jude's School and a Roman Catholic, gives diagnostic reading tests similar to those given by Margaret Kroon. One of Miss Barth's first tasks during the 1981-82 school year was to set up a time schedule that would mesh her classes with those of the St. Jude teachers. On the first day of the 1981-82 school year, she went to the various classroom teachers to resolve scheduling conflicts. Candidates for her reading classes are recommended to her by the St. Jude teacher and then tested by her. *Testimony of Ann Barth.*



137. Gwen Prong, a Shared Time enrichment reading teacher at West Side Christian School, tested around 120 students herself, going to various classrooms to diagnose them. *Testimony of Gwen Prong*. See *Finding of Fact 97* for a discussion of Mrs. Prong's efforts to desanctify the portions of the nonpublic school classrooms she visited.

138. John Young testified that the "zero hour" at Christian, West Catholic, and Catholic Central High Schools are coterminous with the public school calendar. See *Exhibits 57 & 58*.

139. William Gritter identified a number of Shared Time teachers who are listed as employees of the Christian Schools during the 1981-82 school year. *Testimony of William Gritter*. At Millbrook Christian School, the "Staff List" indicates at least, three Shared Time teachers—Gwen Pott (art), Clare Vredeveld (physical education), and Shirley Van Woerkem (remedial reading)—as employees of Millbrook. *Id.*; *Exhibit 51* at 2. Gwen Pott's and Clare Vredeveld's schedules are set forth on the "Room and Master Schedule 1981-82 Millbrook Christian School" even though they are public school employees working in the Shared Time program. *Exhibit 51* at 6. Furthermore, all the classes listed under their names are Shared Time classes. *Id.* Even the locations of these "public school" teacher's classrooms are illustrated in the student handbook published by Millbrook Christian. *Id.* at 7. In no instance is there any indication that these are Shared Time teachers or classes. Mr. Gritter testified that "a mistake" was made in including these exclusively public school employees in a publication describing a Christian School. The same "mistake" is included in the 1981-82 parent handbook for Millbrook. *Exhibit 50* at 2.

140. The staff list of the 1981-82 parent handbook for Creston-Mayfield Christian School lists three Shared Time teachers as belonging to the staff of Creston-Mayfield: Mr.

Commeret (physical education), Mrs. Koopman, and Mrs. Koetje (both "special classes"). There is nothing to indicate, however, that they are public school employees alone. *Exhibit 52*; *Testimony of William Gritter*. Mr. Gritter agreed that whoever drafted the handbook had made an "error." *Id.*

141. In the 1981 Seymour Christian School parent handbook, the staff directory intermingles the names of four Shared Time teachers—Norma Bratt (aide), Charlotte De Vries (aide), Gwen Pott (art), and Dick VanderKamp (physical education)—with the names and classes of the Seymour Christian teachers. *Exhibit 48* at 2. Again, no mention is made of the fact that these teachers are public school employees only. Indeed, the impression conveyed is that every teacher listed there is a Christian School teacher.

142. The "Special Interest Programs" at St. Stephen's School include the Shared Time courses (reading enrichment, math enrichment, spanish, and physical education) as if they were part of the curriculum offered by St. Stephen's School. *Exhibit 11* at 2 (the morning, during, and afterschool Shared Time programs at St. Stephen's and all other nonpublic schools are itemized at *Exhibit III & Exhibit 90* at Interrogatory 79 & Attachment). There is no reference to the "public" nature of these classes. Sacred Heart School and Marywood Academy integrate Shared Time classes and teachers directly into their publications, often without so labelling them. *Exhibit 4* at 2, 6; *Exhibit 3*.

143. Immaculate Heart of Mary School, not the Grand Rapids Public Schools, dictates the manner by which parents can confer with their child's teacher in the Shared Time program: "[p]arents wishing to confer with a child's teacher can do so by calling the school office and arranging for an appointment. Appointments with special teachers—band, music, art, special reading, etc. [Shared Time classes]—should also be made in this manner." *Exhibit 6* at 3 (emphasis added).

144. Most Catholic elementary schools prescribe and enforce a "Dress Code" for students, both boys and girls. *Exhibit 1* at 9; *Exhibit 3* at 2; *Exhibit 4* at 5; *Exhibit 6* at 5-6. This dress code is maintained even when students attend elective Community Education classes at a public school building. See *Exhibit 6* at 52, where parents of Immaculate Heart of Mary students are admonished: "since elective classes are an extension of IHM's school day, students who attend them must abide by IHM's Dress Code."

145. Each of the publications described above was published for the audience (parents and students) intended to receive it. *Testimony of William Gritter, John Jaksa, Timothy Dwyer, and Sister Janet Mish.*

#### F. Political Entanglement

146. Both Deputy Superintendent Elmer Vrugink and Lawrence Pojeski, President of the Grand Rapids Board of Education, testified that the Shared Time and Community Education programs have been helpful to the Grand Rapids Public Schools at millage elections. In the March 1980 millage campaign Defendant School Board published a citizens handbook "Millage 1980" which was distributed as a factual sourcebook to campaign workers. *Exhibit 28*. At pages 29-30 it describes the various services provided by Defendant for nonpublic schools, listing among these the Shared Time and Community Education programs. Defendant School District has purposely made a political issue of these programs and services in order to favorably influence the outcome of school millage elections. See *Exhibit KKK* at 10, which is a Report by the Committee to Study Community Education.

147. In the last three to five years during which the Shared Time and Community Education programs have shown their greatest growth, nonpublic schools in the Grand Rapids area have maintained or increased enrollments, while the Grand

Rapids Public School District has suffered consistent annual losses. *Exhibit 72* (Christian Schools); *Exhibit 20* at 73 (Catholic Central and West Catholic High Schools); *Exhibit TTT* at 9. In one year alone, 1980-81 to 1981-82, the Grand Rapids School District suffered a decline of 3.5% (909 students) in grades K-12. *Exhibit 90* at Interrogatories 91, 92.

148. In the past five years Defendant Grand Rapids School District has closed nine school buildings previously occupied by elementary and middle school programs, and four of these have been sold to sectarian school associations which have re-opened them with religious school programs (Michigan Oak, Crestview, Oakleigh, and Burr Oak). *Exhibit 90* at Interrogatories 69, 70, 71.

#### G. Miscellaneous Contacts

149. Betty Rowlands, the Grand Rapids Public Schools Reading Supervisor, testified that grades for the Shared Time reading classes are sent to the students through the Shared Time office. Deacon Dale Hollern testified that credits or grades for Shared Time classes are sent to him by the Grand Rapids Public Schools. Edward Wagner testified that credits and grades are received via a transfer from the public schools. He added that Shared Time classes are credited toward the student's graduation.

150. Sister Mish testified that any equipment owned and used by the Grand Rapids Public Schools is locked in storage rooms and closets on the premises of the nonpublic school buildings. Messages for Shared Time staff members are routed through the school office. Shared Time teachers have access to the Immaculate Heart of Mary teacher's lounge.

151. The "Guidelines for Parents" states that parents who wish to confer with "special teachers—band, music, art, special reading, etc." should contact the school office for an appoint-

ment. *Exhibit 6* at 3. The very next paragraph in the "Guidelines" provides for the procedure to be followed when a dispute arises between parent and teacher. *Id.* Parent-teacher conferences at other schools do not distinguish between Shared Time and private school teachers in terms of arranging appointments. *Exhibit 1* at 15; *Exhibit 4* at 9; *Exhibit 18* at 12; *Exhibit 46* at 7; *Exhibit 47* at Q; *Exhibit 49* at 5.

### III. PRIMARY EFFECT OF ADVANCING RELIGION

152. During the 1981-82 school year, forty-one private religious schools accepted Shared Time classes from the Grand Rapids Public Schools. *Exhibit 90* at Interrogatory #79 and Attachment (this excludes Climbing Tree School, which is a secular private school, and Grand Rapids Baptist Academy, Plymouth Christian School, and Lamont Christian School, which participate only in Outdoor Education, a program which has been dismissed from this lawsuit).

153. Analysis of *Exhibit 90* at Interrogatories 8 and 79 reveals that for the school years from 1978-79 to 1981-82 the number of participating nonpublic schools and Shared Time and Community Education classes has steadily increased. The following table sets forth the extent of increase in each category:

	1978-79	1979-80	1980-81	1981-82
<i>Participating</i>				
<i>Nonpublic Schools</i>	37	37	38	41
<i>Shared Time and</i>				
<i>Community Education</i>				
<i>Classes</i>	1,095	1,101	1,149	1,757

From a small beginning about 1973, the program has mushroomed to cover 41 schools and over 1,750 classes.

154. Lawrence Pojeski has been a member of the Grand Rapids Board of Education for thirteen years. He was elected President of the Board in June 1981. Mr. Pojeski generally agreed that the Shared Time program has grown and that no attempt has been made to slow the increases in the program. In response to a question from Plaintiffs' counsel, he agreed that it might become a "viable possibility" to lease the entire private school building "except for catechism." This striking attitude displayed by the head of the School Board reflects the trends mentioned above. *Testimony of Lawrence Pojeski.*

155. The Shared Time classes offered during regular school hours consist of art, music, physical education, reading, and mathematics. In addition, Community Education classes offered before school and after school at the private schools consist of over 200 courses in a wide variety of subject areas. *See Exhibit III and Attachment.* At Catholic Central, West Catholic, and Christian High Schools such courses as psychology, journalism, calculus, creative writing, advanced biology, and criminology were offered by the public schools during the 1981-82 academic year. *Id.* The Catholic and Christian Elementary Afterschool programs have around 160 "public school" classes covering over fifty class titles. *Id.*

156. Witnesses from the nonpublic schools have testified that their schools receive no monetary or educational benefit from the Shared Time program. They imply that the nonpublic school students are the sole beneficiaries of the "public school" classes. An examination of their testimony and various nonpublic school publications, however, establishes that the program directly benefits the nonpublic schools themselves.

157. The "Guidelines for Parents" of Immaculate Heart of Mary School provides:



## COMMUNITY EDUCATION CLASSES

A variety of classes for enrichment purposes are offered after school one day per week for interested children at no cost to them. The sessions are financed through the *Catholic Community Education Office which is subsidized by the Grand Rapids Public Schools Community Education Program*. IHM Community Education classes run for twelve weeks each semester; classes are about one hour and forty minutes long. Complete information about this program is sent home in special bulletins to parents prior to the beginning of the classes. *Exhibit 6 at 3* (emphasis added).

Thus, the official parent handbook for Immaculate Heart of Mary School contains this admission that a program of the school is subsidized by the Defendant Grand Rapids Public Schools through the Community Education Program.

158. Throughout the handbooks and brochures of the private schools, the Court finds repeated references to the total education and curriculum offered by the private schools. Immaculate Heart of Mary, for example, "provides a *full grade school curriculum* in an environment which offers children opportunities to live in society as mature, responsible, Christian citizens, deeply committed to God and His Kingdom." *Exhibit 6 at "i."* (emphasis added). In the same publication, there is a description of Shared Time classes that are available as part of the total curriculum of Immaculate Heart of Mary School. *Id. at 50-51.*

159. Because these classes were not offered before Shared Time and are "supplementary," it is apparent that the Grand Rapids Public Schools thereby enable Immaculate Heart of Mary and the other private schools to offer a "full grade school curriculum." Sister Janet Mish testified that the Shared Time courses add to the "fullness of life" and are part of the "total

educational program." Although she added that the children would suffer most from not having music, art, and physical education classes, it is absurd to argue that the school would not suffer as well. Its ability to attract and retain students is directly related to the wide variety of courses offered in the Shared Time program. Indeed, a small handout published by Immaculate Heart of Mary that can be best described as an advertisement emphasizes the wide spectrum of courses that Shared Time enables the school to provide. *Exhibit 5.*

160. The St. Adalbert handbook advertises the fact that Community Education classes are offered at "no cost to the student. The classes are financed through the *Catholic Community Education Office which is subsidized by the Grand Rapids Public Schools Community Education Program.*" *Exhibit 1 at 9* (emphasis added).

161. Marywood Academy announces that its "Curriculum includes: art and music, dance and drama, physical education, and foreign languages." *Exhibit 3.* Art, physical education, and foreign languages (latin, spanish, and french) are Shared Time classes at Marywood. *Exhibit 90 at Interrogatory #79, Attachments A and B.* These Shared Time and other "supplementary" classes are listed as part of the total curriculum to inform parents and students of the diversity of its school program.

162. Under the caption "Curriculum," Sacred Heart School "offers its students a well-rounded curriculum which focuses on the basics. . . . Augmenting the curriculum are full-time consultants in the areas of Reading and [Shared Time] Mathematics. These teachers are available to provide remedial or enrichment material for students. . . . Regular weekly instruction in Music, Art, and Physical Education are provided through the Shared Time Program of Grand Rapids Public Schools." *Exhibit 4 at 6. See Exhibit 90 at Interrogatory #79, Attachment A.* Timothy Dwyer testified that Sacred Heart

would continue without the Shared Time classes; nevertheless, he would attempt to replace them. An attempt to replace certain classes that might be eliminated is solid evidence of their value.

163. St. Stephen's School includes "Enrichment Programs" as part of its curriculum in addition to what the Defendants have generally labelled "core subjects." *Exhibit 11* at 2. The brochure also lists "Community Education," "Support Services," and "Special Interest Programs," all of which contain some Shared Time courses. *Id.* at 2-3; *testimony of John Jaksa*; see *Exhibit 90* at Interrogatory #79, Attachment "A" and *Exhibit III* for a complete survey of "public school" classes at St. Stephens School.

164. Catholic Central High School offers "a variety of fully accredited enrichment courses" in the morning Community Education program. *Exhibit 21* at 3-4. Many of these elective courses supplied by the public schools are extensions or cognates of other electives offered by Catholic Central. Indeed, some Community Education classes have prerequisites offered by Catholic Central. *Exhibit 21* at 4-1 to 13-1 (Community Education courses are designated as "900" level courses in the curriculum guides).

165. One course in particular illustrates the benefit of the Shared Time program to Catholic Central. During 1981-82, a class was offered by Catholic Central entitled "Yearbook." *Exhibit 21* at 6-3. This is a journalism-type class that is responsible for publishing *Spires*, the yearbook of Catholic Central. *Id.* For the 1982-83 school year, however, the "Yearbook" class will be taken over by the Shared Time program of the public schools. *Exhibit 22* at 6-3 and 3-5. Thus, the Grand Rapids Public Schools will be (1) offering exactly the same course that was previously provided by Catholic Central and (2) directly financing a quintessential Catholic Central

publication. The same subsidy is conferred upon Oakdale Christian School, which also has a Shared Time "Yearbook" class. *Exhibit III*.

166. Catholic Central recommends various study programs for its students according to their career interests. *Exhibit 21* at 3-1 to 3-3. Some of the "suggested electives" for these programs are Shared Time classes. In fact, in the "Business Education Program," certain Shared Time or Community Education classes such as Business Machines and Business Law are "highly recommended." *Id.* at 3-3 and 5-1.

167. At Catholic Central and West Catholic, physical education is *required* for graduation. *Exhibit 21* at 3; *Exhibit 23* at "a" and "b." Physical Education is a Shared Time course. *Exhibit 90* at Interrogatory #79, Attachment A.

168. The Introduction to the West Catholic High School handbook singles out the wide spectrum of the academic program and specifically includes programs that are "supplemental":

West Catholic features a sound academic program which enables students to attend the college or pursue the career of their choice. *The standards are high and the curriculum is broad.* Besides the standard college prep curriculum students may select college credit courses in English, History or political studies in the West Catholic facility. Also available in the West Catholic facility are Home Economics, nursery school training, woodworking, arts and crafts, architectural drawing, ceramics, leadership training and theater arts. For students interested in vocational courses, there are the Skills Centers, Educational Park and Incentive to Learn. *Exhibit 24* at 1 (emphasis added).



The importance of these "supplemental" classes lies in the very language used by West Catholic to describe its program. The school "features" a complete and "sound" academic program. A curriculum augmented by Shared Time and Community Education classes allows West Catholic to offer what it could not otherwise provide to its students. The diversity of the curriculum is an attribute that distinguishes West Catholic from other secondary schools. In describing the Shared Time program, West Catholic speaks as if the classes were provided by it in conjunction with the Grand Rapids Public Schools:

West Catholic offers optional classes each morning from 7:30 to 8:10. This program is designed to offer students the opportunity to take courses which could not be offered during the regular school day. All students have the opportunity to take classes and they are given credit on their permanent record. This program is funded by Grand Rapids Community Education. *Exhibit 24* at 19.

169. The Christian Schools are likewise concerned that people know they have a complete and comprehensive academic program. In a television program sponsored by the Grand Rapids Christian School Association for its April 1982 fund drive, the viewer is informed that the Christian Schools "have art and music classes, just like other schools have." *Exhibit 82* ("Focus on Christian Education") at 1. At the elementary schools, "[s]pecialized teachers are available to all students in art, vocal music, physical education, band, and orchestra." *Exhibits 60-63* at 2.

#### 170. Creston-Mayfield Christian School

offers a comprehensive curriculum. Heavy emphasis is placed upon reading, language, arts, and mathematics. Other subject areas include religious studies, social studies,

science, penmanship, spelling, physical education, music, art, band, and orchestra. *Exhibit 59* at 2.

Reading and physical education are Shared Time classes. *Exhibit 90* at Interrogatory #79, Attachment A. Grand Rapids Christian High School "offers a broad curriculum of college preparatory, business education, and general industrial skills courses." *Exhibit 64* at 1. Industrial arts and several business courses are provided by the Community Education "zero hour" morning program. *Exhibit JJJ. Exhibits 57, 58.*

171. Lutheran Schools participating in the Shared Time program follow the same pattern of advertising a complete curriculum by reference to particular Shared Time classes. *Exhibit 13* at 2. Immanuel-St. James Lutheran School "offers a complete secular course of study covering subjects commonly taught at the Kindergarten, Elementary, and Junior High levels." *Exhibit 18* at 8. The "subjects taught are similar to those taught in the Public Schools—Language Arts, Mathematics, Social Studies, Science, Fine Arts, Physical Education, and Industrial Arts." *Id.* Art and physical education are Shared Time classes. *Exhibit 90* at Interrogatory #79, Attachment A. The administrators at the Immanuel-St. James Lutheran Schools take pains to emphasize the so-called supplemental classes in order to make a favorable comparison with the public schools.

172. All of the publications heretofore mentioned concerning the curricular diversity of the Catholic, Christian, and Lutheran schools are made available to the public. *Testimony of William Gritter, Edward Wagner, Ronald Boss, John Jaksa, Kraig Johnson.*

173. The notion that Shared Time classes supplement rather than supplant courses at the private religious schools is not a crucial factual issue in this lawsuit. The key question is whether the Shared Time classes provide educational and



financial benefit to the nonpublic schools. In a sense, a program that *increases*, rather than duplicates, the curriculum at a given school is of greater benefit to the school. Without Shared Time, Catholic Central, for example, would be unable to offer such courses as Jazz Ensemble, Vocal Jazz choir, Mechanical Drawing, Theory of Journalism, and a host of other worthwhile classes. *Exhibit 21* at 4-1 to 13-1; *Exhibit JJJ*.

174. Various school administrators have testified that they would not replace any of the Shared Time classes if the program were held unconstitutional. *Testimony of Sister Janet Mish, Robert Cichewicz*. In so stating, they could not possibly have meant that the Shared Time program is of marginal value to them. Indeed, the contrary is true. The great value of these classes was emphasized by principals, administrators, and teachers alike. Dr. Vrugink testified that the feedback about Shared Time has been highly favorable. He was applauded after speaking about the program to a group of private school parents and administrators. The reason that the private schools would not replace the Shared Time classes is the prohibitive cost of doing so. *Testimony of William Gritter*. This testimony simply confirms that the wide variety of courses offered by the public schools confers a financial and educational benefit on the private schools. If the replacement cost is "prohibitive," then the financial benefit must be large indeed.

175. The actual numbers for the 1981-82 school year establish that a substantial subsidy is being made by the Grand Rapids Public Schools to the private religious schools through the Shared Time program. It is undisputed that it costs over \$3,000,000 to provide Shared Time classes to the private religious schools. The 10,000 students participating in these part-time "public school" classes are enrolled full-time in the private religious schools which accept those classes. *See Finding of Fact 109*. Many of the teachers who teach in the morning Community Education program are also private religious school

teachers who benefit financially as Grand Rapids Public School employees. *See Findings of Fact 114-129*. There was testimony that in the afterschool Community Education classes, *all* of the teachers were also private school employees. *Testimony of Sister Mish* (Immaculate Heart of Mary), *Timothy Dwyer* (Sacred Heart), *John Jaksa* (St. Stephens).

#### IV. PRIVATE NATURE OF SHARED TIME CLASSES

176. Throughout the trial, the Defendants have constantly referred to the various Shared Time classes as "public school" classes. Numerous exhibits and testimony regarding the religious and racial composition of the nonpublic schools and attendance by non-residents of the Grand Rapids school district contradict the public nature of the Shared Time classes.

##### A. Religious and Racial Composition

177. The religious makeup of the private religious schools has been discussed in Section "I." The student bodies of the Catholic, Christian, and Lutheran Schools are overwhelmingly Catholic, Christian Reformed or Reformed, and Lutheran, respectively. *See Findings of Fact 6-87, supra*. And, as the various witnesses successively reaffirmed, students for the Shared Time classes are drawn exclusively from the student bodies of these same Catholic, Christian, and Lutheran Schools.

178. The Defendants have stressed the "open enrollment" of the Shared Time classes and the service that they provide to the community at large. However, typically, nonpublic schools enroll students who are caucasian and belong to a particular religious faith. At Catholic Central High School, for example, 847 (93%) of the 909 students enrolled during 1981-82 were white, and 877 (96.5%) were Catholic. *Exhibit 34*. At West Catholic High School, Principal Edward Wagner testified that out of an enrollment of 1,130 students, only 20 (2%) were

minorities, and 90% were Roman Catholic. Jim Chesla, a Shared Time teacher at West Catholic, testified that there are no black students there.

179. At Sacred Heart School there are no black students and only eight Hispanics out of a total of 197 students. Only ten (5%) are non-Catholic. *Testimony of Timothy Dwyer*. Out of the 424 students enrolled at Immaculate Heart of Mary during 1981-82, nine (2%) were minorities and fourteen (3%) were non-Catholic. *Testimony of Sister Janet Mish*. At Oakdale Christian School the student body is 34% minorities. At Alexander Public School, which is across the street from Oakdale, about 90% of the 600 students are black. *Testimony of Ronald Boss*. The neighborhood in which these schools are located is about 75% black. *Testimony of William Gritter, Ronald Boss*.

#### B. Attendance By Nonresident Private School Students in Shared Time Classes

180. It has been established from testimony that many of the private religious schools enroll students from outside the school district of Grand Rapids. *Testimony of William Gritter, Edward Wagner, Dale Hollern*. Dr. Elmer Vrugink testified that nonresidents of the Grand Rapids school district may attend Shared Time classes simply by virtue of attending the private schools participating in the program. Families from as far away as Kentwood and Cascade send their children to private schools and are thus eligible to take advantage of the "public school" classes. *Exhibit 6 at 2*. West Catholic enrolls students from such outlying areas as Sparta, Allendale, Rockford, and Coopersville. *Exhibit 24 at 4*.

181. Some of the private religious schools featuring Shared Time classes are located outside the territorial limits of the School District of Grand Rapids. St. Stephen's is in East Grand Rapids; Assumption in Belmont; Holy Name and St. John Vian-

ney in Wyoming; Holy Trinity in Alpine Township; and Zealand Christian, St. Michael, St. Joseph-Wright, Borculo Christian, and South Olive Christian are in Ottawa County approximately 15 miles outside the District. *Exhibit JJ*.

182. Dr. Elmer Vrugink testified that the attendance boundaries for the individual Grand Rapids Public Schools would not apply to the "public school" classes in the private schools. Thus, a student who attends Sylvan Christian School and enrolls in a "public school" Shared Time class is not subject to any attendance boundaries by the Grand Rapids Public Schools. That is left to the private religious schools.

183. The parents of a student who resides outside the Grand Rapids School District may apply for admittance to a school owned and operated by the District and, if such application is granted, he is admitted as a tuition student. However, a non-resident who enrolls in a parochial or other non-public sectarian school located within the Grand Rapids School District is automatically admitted to the "public school" Shared Time and Community Education classes conducted in that nonpublic school building without payment of tuition to Defendant Grand Rapids School District. *Testimony of Elmer Vrugink, William Gritter, Dale Hollern. Defendant State of Michigan Exhibit SBE-A*.

184. Dr. Vrugink and Mr. Young stressed that, as a practical matter, there would be no situation in which a student attending a public school would attend any of the Shared Time classes at the nonpublic schools. Mr. Young referred to some forty plus charts detailing the large amount of "instructional time" that would be lost if the nonpublic school students were to travel to the public schools to attend Shared Time classes. *Exhibits JJ(a)-JJ(qq)*. As a practical matter, therefore, the Shared Time classes will remain filled exclusively with nonpublic school students.



# APPENDIX

## Glossary of Persons who Testified as Courtroom Witnesses

- David Bailey*, Assistant Superintendent of Personnel, Grand Rapids Public Schools
- Ann Barth*, Shared Time Reading Teacher, Grand Rapids Public Schools
- George Berends*, Administrator, Grand Rapids Baptist Academy
- Ron Boss*, Principal, Oakdale Christian School
- James Chesla*, Shared Time Math Teacher at West Catholic High School  
Coach, Girls Tennis Team, West Catholic High School
- Robert Cichewicz*, President, Board of Education of Sacred Heart School
- Timothy Dwyer*, Principal, Sacred Heart School  
Public School Community Education Aide at Sacred Heart School
- William Gritter*, Superintendent, Grand Rapids Christian School Association
- Sister Marie Heyda*, O.P., Emeritus Professor of History at Aquinas College
- Deacon Dale Hollern*, Principal, Catholic Central High School  
Public School Community Education Supervisor at Catholic Central
- John Michael Jaksa*, Principal, St. Stephen's School  
Public School Community Education Aide at St. Stephen's School  
Community Education Teacher in Arts and Crafts at St. Stephen's School

- Kraig C. Johnson*, Principal, Immanuel-St. James Lutheran School
- Joe Leonardo*, Assistant Director of Athletics and Physical Education, Grand Rapids Public Schools
- Sister Janet Mish*, Principal, Immaculate Heart of Mary School
- Phyllis Penny*, Shared Time Reading Teacher, Grand Rapids Public Schools
- Lawrence Pojeski*, Member, Grand Rapids Board of Education
- Gwen Prong*, Shared Time Reading Teacher, Grand Rapids Public Schools
- Elisabeth Rowlands*, Supervisor of Reading, Grand Rapids Public Schools
- Daniel Visser*, Shared Time Industrial Arts Teacher at Christian High School  
Public School Community Education Teacher at Christian High School
- Elmer Vrugink*, Assistant Superintendent, Grand Rapids Public Schools
- Edward Wagner*, Principal, West Catholic High School  
Public School Coordinator of Community Education at West Catholic High School
- John Young*, Director of Shared Time, Grand Rapids Public Schools
- Ken Zandee*, Shared Time Physical Education Teacher at Christian High School  
Public School Community Education Teacher at Christian High School  
Basketball Coach, Christian High School



**MAY 11 1984**

**No. 83-990**

**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 1983**

**ALEXANDER L. STEVENS**  
**CLERK**

**THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS;  
PHILLIP RUNKEL, Superintendent of Public Instruction of the  
State of Michigan; STATE BOARD OF EDUCATION OF THE  
STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer  
of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON  
AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENE-  
LOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO  
and JANICE FLOWERS, JOHN and SHIRLEY LEESTMA,**  
**Petitioners,**

**-VS-**

**PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRI-  
CIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,**  
**Respondents.**

**On Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit**

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**DATED: May 10, 1984**

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## QUESTIONS PRESENTED

### I.

Whether it constitutes a *per se* violation of the establishment clause to provide secular, supplementary, nonsubstitutionary instructional services to part-time public school students on premises leased from religiously-oriented nonpublic schools under conditions of public school control.

### II.

Whether the Court of Appeals' majority ruling upholding respondents' state taxpayer standing is inconsistent with this Court's decisions where, as here, respondents challenge the decisions of the executive branch of state government and of the school district, and do not challenge the constitutionality of a legislative appropriation.

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No. 83-990

**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 1983**

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**THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEESTMA,**

**Petitioners,**

**-vs-**

**PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,**

**Respondents.**

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**On Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit**

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**JOINT BRIEF FOR PETITIONERS**

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**OPINIONS AND ORDERS OF THE COURTS BELOW**

The September 23, 1983, Opinion of the Court of Appeals, 718 F2d 1389 (1a), and the Notice of Entry of Judgment (64a), along with the August 16, 1982, Opinion and Judgment of the



District Court, 546 F Supp 1071 (65a), are in the Appendix to the Petition for a Writ of Certiorari.<sup>[1]</sup>

## JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on September 23, 1983. The petition for certiorari was filed on December 15, 1983, and was granted on February 27, 1984. The Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) (West 1966).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, amendment I — "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, article III, section 2, clause 1 — "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Counsuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens

[1]

Hereafter, references to the Appendix to the Petition for Writ of Certiorari will be indicated by page numbers enclosed in parentheses (1a) and references to the Joint Appendix will be indicated by J.A. followed by page numbers, enclosed in parentheses (J.A.1).

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

## STATEMENT OF THE CASE

### I. The Course of Proceedings and Disposition Below.

On August 7, 1980, respondents<sup>[2]</sup> filed this lawsuit in the United States District Court for the Western District of Michigan, challenging the provision of Shared Time and Community Education educational services on premises leased from religiously-oriented nonpublic schools in the Grand Rapids community. Respondents claimed that such programming violated the establishment clause.

Following the intervention of a representative group of parents with children participating in the programs, an 8-day nonjury trial was conducted before Judge Gibson in May of 1982.<sup>[3]</sup> After the close of proofs, but before a decision on the merits, Judge Gibson recused himself and the matter was re-assigned to Judge Enslen who proceeded to decide the case on the basis of the transcript testimony and other documentary evidence which had been submitted to Judge Gibson.

[2]

Six individuals (i.e., taxpayers) and Americans United for Separation of Church and State filed the instant action. After the trial on the merits, the institutional plaintiff was dismissed for lack of standing. (J.A. 37).

[3]

By stipulation, respondents eliminated any claim regarding the provision of Title I (now found at 20 U.S.C.A. §2701 *et seq* (West Supp. 1983)) programming in area nonpublic schools by the GRPS. (J.A. 30, 31).



Judge Enslen issued his Memorandum Opinion (65a) on August 16, 1982, concluding that the services at issue violated the establishment clause. On that same date, the Court issued an injunctive order permanently enjoining the petitioners "from continuing to operate" such programs.[4] (123a).

On August 19, 1982, the Grand Rapids Public Schools (hereinafter GRPS), state respondents and intervenors, filed their respective appeals with the United States Court of Appeals for the Sixth Circuit. [5] On September 23, 1983, the Court of Appeals, in a 2 to 1 decision, upheld the District Court's conclusion that the GRPS Shared Time and Community Education programs violated the establishment clause. This Court granted the petition for a writ of certiorari on February 27, 1984.[6]

[4]

Not all of the nonfederally funded, leased premises programming conducted by the GRPS was enjoined by Judge Enslen's August 16 ruling. At the conclusion of respondents' proofs, the trial court granted petitioner GRPS's Rule 41(b) motion, thus sustaining the Drownproofing, Outdoor Education, and Driver's Education programs, each of which involved some instruction in the nonpublic schools. (J.A. 38).

[5]

Pending those appeals, petitioners attempted unsuccessfully to obtain a stay of the trial court's ruling from the District Court, the Sixth Circuit Court of Appeals, and the Circuit Justice.

[6]

On March 7, 1984, after this Court had granted certiorari, the Michigan State Board of Education, by a 5-2 vote, opined that the instant programs violated the Michigan and the United States constitutions, and asked that it be withdrawn as a petitioner. It is not the function of this lay board, Mich. Const. art 8, §3, to render legal opinions. The responsibility for determining the legal position of the state of Michigan is reposed in the Attorney General of Michigan. Mich. Const. art 5, §21. See generally *Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262 (1977), noted in *Personnel Administrator v. Feeney*, 442 U.S. 256, 260 n.5 (1979). Moreover, under Michigan law, the State Board of Education does not have the authority to terminate the continued oper-

## II. The GRPS Educational Services.

### A. Introduction.

Since early in this century, the Michigan legislature has entrusted local public school districts with the discretionary authority to develop educational programming which they believe will most effectively meet local educational needs.[7] In this framework, local districts are free to develop and implement a vast array of educational services consistent with their communities' needs or desires and their ability to meet them — an arrangement which encourages responsible experimentation and creativity at the local level. Moreover, the Michigan legislature has authorized the payment of state school aid funds to local boards of education for part-time instruction, by public school teachers, of nonpublic school students who are also part-time public school students. (J.A. 157).[8] As recognized by the Court of Appeals majority (2a), recent decisions of the Michigan judiciary have specifically analyzed and approved the constitutionality of such instruction for part-time public school students on premises leased from religiously-oriented nonpublic schools under conditions of public school control. *Traverse City School District v. Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971); *Citizens to Advance Public Education v. Superintendent of*

ation of the programs at issue here. In any event, this lay legal opinion is contrary to the decisions of the Michigan courts and, in light of this Court's grant of certiorari, decidedly premature.

[7]

The present general enabling provision is contained in Mich. Comp. Laws § 380.1282 (1979). For a listing of the predecessor provisions, see the Historical Note to Mich. Comp. Laws Ann. § 340.583 (West 1976) (repealed).

[8]

For a full explanation of state funding for part-time public school students that also attend nonpublic schools, see J.A. 152-159 and 70a-73a.

*Public Instruction*, 65 Mich. App. 168, 237 N.W.2d 232 (1975), *appeal denied*, 397 Mich. 854 (1976).

In accord with those precedents and its basic philosophy of education, which is to provide educational opportunity for the *total* community,<sup>[9]</sup> the GRPS have made available to its Grand Rapids constituency a variety of instructional offerings designed to meet the many and varied local educational needs. At issue in this case are those remedial and enrichment offerings which were made available to approximately 11,000 students on premises leased from forty-one area nonpublic schools<sup>[10]</sup> through the operation of the Shared Time and Community Education programs. Those programs were offered by the GRPS beginning with the 1976-77 school year and continuing through the 1981-82 school year. The type of course offerings and the number of part-time public school students receiving such educational opportunities remained constant during the last four years those programs were offered. (J.A. (¶31) 302).

Before addressing the specifics of such programming, it is helpful to place that programming in perspective with a brief review of the unique community characteristics found in Grand Rapids.

[9]

J.A. 164, 195, 201, (¶6) 296. The parenthetical paragraph citations (¶.....) refer to petitioners' Proposed Findings of Fact filed with the District Court which are contained in the Joint Appendix as a "road map" to the massive trial record. Those findings include numerous supporting record references.

The "Sworn Offers of Proof" beginning at J.A. 52, *were received in evidence* by stipulation of the parties. (Record, vol. VIIA, at 1059-1061, vol. VIIIB, at 1380, 1384-1385).

[10]

This number includes one secular, private school, Climbing Tree. (J.A. 199).

## B. The Grand Rapids Community.

Grand Rapids is a religiously-pluralistic<sup>[11]</sup> community in which approximately 30% of the school age population (*i.e.*, grades K-12) attend nonpublic schools. In the 1981-82 school year,<sup>[12]</sup> 11, 362 students (J.A. 221) attended forty-three area nonpublic schools and 26,148 students<sup>[13]</sup> attended fifty-one area public schools. GRPS Exhibit JJ, a map of the city (J.A. 199), depicts the number and location of local public and non-public schools. In 1981, the GRPS published a statistical sum-

[11]

When subdivided as groups according to religious orientation, the forty-three area nonpublic schools may be categorized as follows:

Private (Non Sectarian)	1
Christian (1 High School)	12
Lutheran	3
Baptist	1
Seventh Day Adventist	1
Catholic (2 High Schools)	25
<hr/>	
Total	43

(J.A. 199). The proofs showed that children from as many as fifty different denominations attended some of the Christian schools (J.A. (¶280) 369; Record, vol. IIB, at 423-424, vol. IVA, at 634-637) and in some of the Catholic schools, nearly one-half of the student body was non-Catholic. (J.A. 107, 121, (¶269) 365). This was particularly true in inner-city Christian and Catholic schools with substantial minority pupil enrollments. (J.A. 112, 121, 137, Record, vol. IVA, at 629-630).

[12]

That school year was the last year prior to the lower court ruling.

[13]

The enrollment statistics for the GRPS were (J.A. 215-221):

Grade Levels	No. of Schools	No. of Students
Elementary	42	14,261
Middle (Jr. High)	5	3,490
High School	4	6,608
Alternative Schools	4	727
Special Education	8	1,062
<hr/>		
TOTAL		26,148



mary examining the distribution of public and nonpublic school students over an eleven-year period of time, beginning with the 1971-72 school year. The study included enrollment data which predated the programming here at issue by some five full school years. The study clearly demonstrated that the percentage of the schoolage population attending area nonpublic schools (i.e., 30%) has remained essentially constant. (J.A. 221).

The GRPS is governed by board members elected by the total population, including those parents who send their children to nonpublic schools. In addition, those parents participate in elections which set the property tax rates for school district operating purposes, and they support the GRPS with their property taxes. Mich. Const. art. IX, § 6. The GRPS have developed an educational philosophy which seeks to make educational opportunity available to the total community. (J.A. 201, 164-165). At issue in this case is not the propriety of that commitment, but the local educational options which were implemented to meet the community's needs.[14]

### C. The GRPS Programs.

#### 1. Scope of Appeal.

The term "Shared Time" refers to instructional offerings on premises leased from area nonpublic schools *during regular school hours*. The term "Community Education," on the other hand, refers to *leisure-time* instructional offerings made available on premises leased from area nonpublic schools *after*

[14]

The respondents did not challenge the evening Community Education program which is offered at some 260 different leased sites (i.e., factories, senior citizens centers, hospitals, nonpublic schools, churches, etc.) for the benefit of over 35,000 local residents. (J.A. (¶¶11-12) 298). Their challenge was limited to daytime leased premises programming.

*regular school hours*. Although the scope of the District Court action encompassed Shared Time and Community Education programming on the elementary *and* secondary levels, the scope of the appeal to the Court of Appeals, and the scope of the instant appeal, was and is limited to the following:

1. Shared Time instruction on the elementary level in remedial and enrichment math, remedial and enrichment reading, art, music, and physical education.[15]
2. Shared Time instruction on the secondary level in math topics, a remedial math course.
3. Community Education instruction on the elementary level in voluntary, leisure-time activities such as model building, rug hooking, and arts and crafts.[16]

#### 2. Equal Availability of GRPS Supplemental Educational Opportunities.

The GRPS enhanced its core curriculum for full-time public school students by providing supplemental, remedial and enrichment educational opportunities to needy and gifted students. (J.A. 166-167, 172, (¶199) 344, (¶¶229-230) 352). These supplemental educational opportunities augmented the students' ability to benefit from the core curriculum. In order to make these opportunities equally available to all needy and

[15]

J.A. 197. The Outdoor Education, Industrial Arts, and Educational Park programs are not at issue in this appeal. The extent to which the forty-one nonpublic schools participated in the programs varied from school to school.

[16]

For a complete listing of the Community Education courses offered during the 1981-82 school year, see J.A. 206-213. Approximately 3,000 students attended the elementary leased premises Community Education program for that year.



gifted school-age children in the community, regardless of their parents' choice of the school of primary attendance, the GRPS initiated the challenged programs in 1976. They did so because of (1) the existence of unmet educational needs which the district was able to meet, (2) the inability of other programs, federal or otherwise, to meet fully those needs,<sup>[17]</sup> and (3) the revenue potential which would thereby increase the district's general operating budget. (J.A. 108-109, 181-182, (¶27) 301). The revenues received by the school district under the state aid formula for such programs in the 1981-1982 school year exceeded the cost of the instructional services by \$3,000,000 dollars, thereby also increasing the revenues available for and enhancing the instructional opportunities provided to full-time public school students. (74a n.6).

None of the course offerings at issue in this appeal served to supplant or replace educational programming otherwise provided by area nonpublic schools. (J.A. 109, 138, 146, (¶35) 304, (¶211) 347; Record, vol. VIIIA, at 1329). The nonpublic schools with children participating in the programs in each instance previously provided and continued to provide a basic core curriculum required for graduation or progression from grade to grade in the respective nonpublic school systems. (J.A. 109, 135, 147, (¶33) 303). The programs did not entail the payment of public funds to nonpublic schools or their teachers.<sup>[18]</sup> The GRPS educational services were designed to meet the special needs of educationally needy and gifted children and to provide nonpublic school children with educa-

[17]

For example, Title I of the Elementary and Secondary Education Act of 1965. (J.A. 181-182, (¶253) 359).

[18]

The nonpublic schools did receive rent for the facilities leased by the GRPS (J.A. (¶128) 323; Record, vol. VB, at 920, (¶131) 324, Record, vol. VIIB, at 1171). See note 23 *infra*.

tional opportunities beyond the basic nonpublic school core curriculum.<sup>[19]</sup>

### 3. Location for Providing GRPS Supplemental Educational Opportunities.

The decision to provide these supplemental, educational opportunities on leased premises was based upon the following considerations: (1) the physical impossibility of providing such programs in the limited space available in public school buildings;<sup>[20]</sup> (2) the prohibitive transportation costs (\$830,000.00 annually) associated with providing these programs in public school buildings; and (3) the desire to eliminate unnecessary pupil transportation which detracts from the overall educational effort in light of the "time-on-task" studies which clearly indicate the educational desirability of minimizing lost student instructional time. (J.A. (¶¶135-136) 325; Record, vol. VIA, at 990-991, vol. VIIA, at 1098-1099).

[19]

Hereafter, petitioners will use the terms "supplementary" and "non-substitutionary" to refer to these particular aspects of the Shared Time and Community Education programs.

[20]

At trial, the GRPS introduced a comprehensive feasibility study which evaluated space and distance considerations in light of the 1981-82 school year statistics. (GRPS Ex JJaa-qq). Based upon the statistics and data compiled, it was concluded that it would not be feasible to conduct the Shared Time program at public school buildings. (J.A. 194). The GRPS transportation study demonstrated that the transportation costs alone would exceed \$830,000 annually. (Record, vol. VIIIA, at 1341-1342).

#### 4. The Nature of the Services Provided.

##### a. Shared Time.

The Shared Time program<sup>[21]</sup> consisted of supplemental GRPS secular course offerings for youngsters which were taught by subject area specialists. (J.A. 165-166, (¶25) 300). Through this program, part-time public school students received instruction in remedial and enrichment mathematics, remedial and enrichment reading, art, music, and physical education. None of the Shared Time course offerings at issue in this appeal were either required for graduation or for progression from grade to grade in any of the area nonpublic schools. (J.A. 109, 147, 174-177, (¶36) 304, (¶¶259-260) 361). None of these courses were previously offered by any area nonpublic school. (J.A. (¶34) 303, (¶35) 304). Most of these instructional offerings met only one or two class periods per week, and in some instances, only met once or twice a month. (J.A. (¶38) 305). All of the Shared Time instructional offerings were also available to full-time public school students through the public schools. (J.A. 162-164, (¶40) 305, (¶199) 344).<sup>[22]</sup> In making these instructional opportunities available, the GRPS did not discriminate among area nonpublic schools or their students. (J.A. 178, (¶41) 305). All eligible students were offered the opportunity to participate.

[21]

The 1981-82 budget for the Shared Time program which included programming not involved in this appeal, was \$1,923,000, or 1.7% of the total operating budget for the district. (J.A. 196).

[22]

Although the term "Shared Time" encompasses those services actually provided on leased premises, the substance of the instructional offerings thus made available were no different from the offerings otherwise available to full-time public school students. Indeed, because of that fact, Shared Time classes were attended exclusively by students who attended area nonpublic schools, even though the program was open to any eligible student. (J.A. (¶139) 326; Record, vol. VB, at 925).

In organizing the Shared Time program each year, the Shared Time director would contact all area nonpublic schools to distribute information concerning the availability of such educational offerings for their students. (J.A. 182-183, (¶173) 336). As part of the information disseminated, the GRPS would provide nonpublic school administrators with written Shared Time Guidelines outlining the conditions of public school control under which the programming would be provided. (J.A. 214). Once the Shared Time director received pupil and course information from the area nonpublic schools, he would then contact the GRPS subject area supervisors to make arrangement for GRPS teaching personnel. (J.A. 183-184, 198). He would also make arrangements for appropriate classroom space in order to accommodate the program (J.A. 184, 202-204) by entering into written standard form leases with the area nonpublic schools for the rental of classroom space on a per-class usage basis.<sup>[23]</sup> Under the terms of the lease, it was required that the rooms be free of any religious symbolism and that they be posted as public school classrooms during the period of public school instruction. (J.A. 124, 200, 202, (¶¶133-134) 324).

Both Courts stated that "[a] significant portion of the Shared Time instructors previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed." (75a, 6a). This is contrary to the record. The uncontroverted testimony of John Young, the Shared Time director, was as follows:

Q. . . . [H]ow many if those [i.e., Shared Time instructors] previously were employed by one of the non-

[23]

The GRPS paid \$6.00/class/wk for elementary classroom space and \$10.00/class/wk for secondary classroom space. These rental amounts were established following a study of the costs and expenses which the public schools incurred in their own buildings. (J.A. (¶131) 324, Record, vol. VIIB, at 1171).



public schools that we have had discussion about in this case?

- A. [Of] [t]he 131 contracted GRPS teachers currently teaching in the Shared Time daytime programming, 13 of those formerly were employed by the nonpublic schools prior to their becoming public school teachers. Three of those people in checking their records are not employed by the GRPS teaching in the same area that they taught at.

(J.A. 193). Accordingly, less than 10% of the GRPS teachers providing Shared Time programming were previously employed by area nonpublic schools.

**b. Community Education.**

The Community Education<sup>[24]</sup> program on the elementary level consisted of voluntary, leisure time offerings which were made available to interested students on leased premises after regular school hours. (J.A. 166-168, (¶206) 346, (¶208) 347). These courses normally met once each week for a twelve-week period. (J.A. 167-168, (¶208) 347; Record, vol. VIIIA, at 1329). They included rug hooking, model building, arts and crafts, and the like. (J.A. 206-213). None of the Community Education programs previously existed in any of the area nonpublic schools. (J.A. 187, (¶211) 347). Additionally, similar programs were available to all full-time public school students. (J.A. 167, (¶210) 347).

The organizational process was somewhat different for Community Education. The director for Shared Time testified that the initial step required the selection of an instructor who was known by the students because the success of a voluntary

<sup>[24]</sup>

The 1981-82 budget for the Community Education program, which included programming not involved in this appeal, was \$926,000, or .9% of the total operating budget for the district. (J.A. 196).

community education program depends in large measure upon the identity of the teacher. (J.A. 186-187, (¶212) 348). Therefore, as was the case with the Community Education program conducted in the public elementary school buildings, in most instances, the instructors would be individuals teaching within that building during the regular school day. (J.A. 186-187, (¶212) 348, (¶213) 349). Of course, during the period of Community Education instruction, that instructor was employed as a part-time public school employee. Normally, the director of Shared Time would contact potential instructors to determine whether they would be willing to teach leisure time courses. Once a teacher had been selected,<sup>[25]</sup> a survey would be conducted to determine whether there was sufficient student interest to warrant offering the course. (J.A. (¶212) 348). If twelve students were interested, the course would be offered.

**5. The Delivery of the Services.**

Once the Shared Time program was organized, the GRPS subject area supervisors (J.A. 198) would assign teaching specialists to provide instruction. (J.A. 166, (¶25) 300, 183-184, (¶174) 338). In most instances, Shared Time teachers would receive teaching assignments in both public school buildings and in leased facilities. (J.A. 63, 68, 85-86, 95, 102; Record, vol. VIIB, at 1223). Typically Shared Time classes would meet only once or twice a week. (J.A. (¶38) 305). In the remedial and enrichment reading and math courses, GRPS teachers would independently analyze and evaluate potential students in order to select those who would be best served by participation in the program. (J.A. 60, 74-75, 78, (¶142) 327). Once such students had been identified by GRPS teachers, they would provide the needed educational instruction. In physical

<sup>[25]</sup>

In the 1981-82 school year, the GRPS employed approximately three hundred part-time instructors in Community Education. (J.A. (¶222) 350; Record, vol. VIIIA, at 1330-1331).



education, music and art, all of the elementary students in participating nonpublic schools received such GRPS supplementary, educational services.

From their inception to implementation, the classes were exclusively controlled by the public school district. The GRPS not only decided what would be offered<sup>[26]</sup> and where,<sup>[27]</sup> but also, who would teach,<sup>[28]</sup> when,<sup>[29]</sup> what would be taught,<sup>[30]</sup> what materials, supplies, and equipment would be used,<sup>[31]</sup> and how students would be selected, graded, and, if necessary, disciplined.<sup>[32]</sup> Shared Time and Community Education teachers were hired,<sup>[33]</sup> assigned,<sup>[34]</sup> evaluated, and supervised<sup>[35]</sup> by public school supervisors. Nonpublic school administrators neither controlled who was assigned to teach,<sup>[36]</sup> nor did they control what was taught<sup>[37]</sup> or the

[26]

J.A. 182-183, 187, 214.

[27]

J.A. 184.

[28]

J.A. 52-54, 186, 214.

[29]

J.A. 96, 103, (¶162) 332.

[30]

J.A. 182-183, 206-213, 214.

[31]

J.A. 60, 70, (¶188) 341.

[32]

J.A. 60-61, 64-65, 78, (¶141) 326, (¶144) 327, (¶193) 342.

[33]

J.A. 52-54, (¶179) 339, 186, (¶223) 350.

[34]

J.A. 183-184, (¶174) 338, (¶232) 352.

[35]

J.A. 54-55, (¶156) 330, (¶232) 352.

[36]

J.A. (¶202(b)) 345, (¶226) 351; Record, vol. IIIA, at 469.

[37]

J.A. (¶202(d)) 345.

teaching methodologies utilized in providing such teaching services.<sup>[38]</sup>

Each year, Shared Time instructors would receive instructions concerning the GRPS Guidelines governing the provision of the secular services in question. (J.A. 184-185). They were instructed that (1) they were public school employees subject solely to the supervision and control of their GRPS supervisors; (2) they were not to discuss religion; (3) they were to follow the GRPS curriculum; (4) they were to teach in leased GRPS classrooms free of religious symbolism; and (5) they were to report any problems to their GRPS supervisors. (J.A. 214).

The Shared Time teachers, like all GRPS teachers, were required to attend regularly scheduled in-service training programs where teachers would meet with their subject area supervisors on a monthly basis in order to discuss recent educational developments and other matters which might improve their teaching effectiveness. (J.A. 57, (¶¶154-155) 329). Additionally, those meetings provided a forum in which to reinforce orientation instructions regarding the guidelines which applied in the operation of the Shared Time program. (J.A. (¶155) 329, (¶166) 333). All Shared Time instructors were subject to the GRPS Progressive Evaluation Performance (PEP) program. Under that program, Shared Time teachers (like all full-time GRPS teachers) were observed in the classroom setting by their GRPS subject area supervisors and provided with a written evaluation of their performance consistent with district standards. Nonpublic school administrators did not have any input into the evaluation process. (J.A. 54-55, 137, 146, (¶156) 330).

[38]

J.A. 124, (¶202(c)) 345.

This case provides a very extensive record which outlines the six-year operational history of the programs. That record contains testimony from nine public school administrators, two public school Board members, and twenty Shared Time teachers, all of which outline in detail the nature, operation, and effect of the programming. There is no indication in the record that the location of the services in any way affected the content of the courses, the teaching methodology utilized to accomplish the GRPS performance objectives, or the goals and aspirations of the individual GRPS teachers for their students. (J.A. 68, 88, 97, 102, 105, (¶¶160-161) 331). None of the teachers had any difficulty teaching within the Shared Time Guidelines (J.A. 214), nor did they in any way feel that the location of the instructional services affected or impacted the secular services which they provided. (J.A. (¶¶160-161) 331). The secular content of these courses was recognized by the Court of Appeals majority:

There is no proof that any teacher in either Shared Time or Community Development [*sic*] classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion.

(35a).

### SUMMARY OF ARGUMENT

This case presents an important issue left unresolved by this Court's earlier establishment clause decisions — the constitutionality of providing supplemental instructional services to nonpublic school students on premises leased from religiously-oriented nonpublic schools under conditions of public school control.

The Court of Appeals majority erroneously applied a *per se* rule that such programs are inherently unconstitutional. Such

establishment clause methodology is impermissible. There are no fixed, *per se* rules in establishment clause cases. The Court of Appeals should have evaluated with particularity the trial record in this case. If it had done so, it would have determined that the programs at issue violated neither the guidelines embodied in the "three-prong test" nor the underlying policy concerns of the establishment clause. The secular educational purpose of the programs was not in dispute. Nor did the programs have the impermissible effect of conferring a substantial benefit on religion. The GRPS did not teach religion, endorse the religious character of the nonpublic schools, subsidize the operation of the affected nonpublic schools, or provide supplemental, secular educational opportunities to part-time public school students that were not also available to full-time public school students. There was no excessive entanglement with religious authorities since the public school teachers teaching on leased premises were under the exclusive control of the GRPS. Administrative contact with nonpublic school personnel in the implementation of these programs was limited and the record shows no friction over the programs' six-year history.

By imposing this *per se* prohibition, the Court of Appeals has significantly constrained GRPS's ability to meet the educational needs of all its citizens in an effective and cost-conscious manner. Such judicial interference with the responsibilities of local government ought not be sanctioned in the absence of a record establishing an actual violation of a constitutional guarantee.

Respondents' reliance on conjecture and a *per se* rule rather than on the actual record should not be surprising. Their lack of personal injury prevents their even presenting the concrete adverseness upon which the court depends in the litigation of difficult constitutional questions. They can assert no injury as taxpayers and suffer only "the psychological consequence presumably produced by observation of conduct



with which one disagrees." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982).

## ARGUMENT

### I.

**WHEN ANALYZED IN LIGHT OF THE ACTUAL RECORD IN THIS CASE RATHER THAN BY THE PER SE METHODOLOGY EMPLOYED BY THE COURT OF APPEALS MAJORITY, THE GRPS PROGRAMS ARE COMPATIBLE WITH THE ESTABLISHMENT CLAUSE.**

#### A. Introduction: The Need to Avoid "Categorical Imperatives" and "Absolutist Approaches".

In analyzing the intended objectives of the establishment clause, this Court has consistently acknowledged that the required separation between church and state, "far from being a 'wall,' is a blurred, indistinct, and variable barrier" whose application and ultimate result depend in large measure on the factual circumstances of each case. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Lynch v. Donnelly*, .... U.S. ...., 104 S. Ct. 1355, 1359 (1984). Some contact between the respective realms of church and state is inevitable.

A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. *The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a her-*

*metic separation of the two is an impossibility it has never required.*

*Roemer v. Board of Public Works*, 426 U.S. 736, 745-746 (1976) (emphasis supplied).

In the context of that reality, what the establishment clause does require is government neutrality towards religion. See, e.g., *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Walz v. Tax Commission*, 397 U.S. 664 (1970). This ultimate goal of neutrality, however, like most constitutional questions requires a sensitivity to the realities of American life. As observed in *Walz v. Tax Commission*:

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. *Short of these expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.*

397 U.S. at 669 (emphasis supplied). In essence, the goal of neutrality seeks to insure a course of government conduct which neither advances nor inhibits religion while at the same time permits religiously-sponsored activities and those of the civil government to co-exist in the secular world.



In delineating an analytical framework for the resolution of cases under the oft-cited "three-part" establishment clause test, this Court in its recent cases has charted a course which avoids the use of "categorical imperatives" or "absolutist approaches at either end of the range of possible outcomes." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980). Justice White, in analyzing the Court's historical approach to such cases, observed:

This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the states — the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth — produces a single, more encompassing construction of the Establishment Clause.

444 U.S. at 662. Or, as recently stated in *Lynch v. Donnelly*, . . . U.S. . . ., 104 S. Ct. at 1361, "no fixed, *per se* rule can be framed." Rather, in each case, lines must be drawn concerning the scope of permissible governmental conduct.

Consequently, the "three-part test" has not served to set the "precise limits to the necessary constitutional inquiry," *Meek v. Pittenger*, 421 U.S. 349, 359 (1975), but rather, as a guideline "with which to identify instances in which the objectives of the Establishment Clause have been impaired," 421 U.S. at 359, namely, the "'sponsorship, financial support, and active involvement of the sovereign in religious activity'" *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. at 772, the three primary evils against which the establishment clause is directed. Again, in *Lynch v. Donnelly*, 104 S. Ct. at 1362, the Court emphasized that, while the three-pronged test is "useful," what is really important is whether the challenged legislation or official conduct "establishes a religion or religious faith, or tends to do so." *Id.* at 1361.

The Court of Appeals, and, indeed, the District Court, failed to employ the establishment clause methodology consistently articulated by this Court. Instead the Court of Appeals majority premised its ultimate establishment clause result on a *per se*, geographic ruling that supplemental public school instruction on leased premises at religiously-oriented, nonpublic schools is inherently unconstitutional. (*E.g.*, 32a). That ultimate result is also inconsistent with many of the subsidiary findings of the courts below which, as we shall demonstrate, support the constitutionality of the instant programs.

If the Court of Appeals majority had approached its analysis in a manner consistent with the holdings of this Court and relied upon the "three-pronged test" as a guide to its inquiry, the result would have been, as we shall point out in the following paragraphs, markedly different.

#### B. The Secular Purpose of the Programs.

In this case, plaintiffs have never seriously questioned the secular purpose of the programs. Both lower courts recognized that the Michigan legislature in authorizing the programs, and the local school authorities in establishing the programs, were motivated by secular educational purposes. (91a-94a, 21a). Further, the district court expressly found that the instructional activities in question had "a positive impact on the participating nonpublic school students" (94a-95a), and that the remedial reading and remedial mathematics portions of Shared Time "confer invaluable benefit upon those children that participate in them." (District Court Opinion of August 19, 1982, at 6 (denying a stay)).<sup>[39]</sup> Clearly, the GRPS achieved its secular educational purposes.

#### [39]

The trial record established that the Shared Time remedial programming served to reach educationally needy students who did not receive Title I services either because they did not reside in Title I target areas, or because of the limited federal funds available. (J.A. 180-182, (¶253) 359).

### C. The Primary Effect.

#### 1. No Teaching of Religion.

Plaintiffs presented no evidence that any GRPS Shared Time or Community Education teacher taught religion. The Court of Appeals majority, noting that "[w]e accept, as did the District Judge, the facts upon which the appellants chiefly rely" (35a), concluded:

There is no proof that any teacher in either Shared Time or Community Development [*sic*] classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion.

(35a). This clear and unequivocal finding, based upon the trial record, dispels any judicial apprehension that these programs will lead to the teaching of religion by public school teachers. The speculative potential for fostering religion in the incipient programs before the Court in *Meek v. Pittenger*, 421 U.S. 349, 369 (1975), did not become a reality here.

It is also legitimate in establishment clause analysis to inquire whether the sectarian function dominates the activities of the nonpublic schools in question. This inquiry is, however, only an initial step. The next and more crucial step in the analysis is to determine to what extent, if any, the sectarian atmosphere of the nonpublic schools affected the conduct of public school personnel on leased premises.

With respect to the nature of the institutions, the record demonstrates that the GRPS teachers providing the challenged instruction worked on premises leased from institutions de-

voted in significant part to providing secular education.<sup>[40]</sup> They employ only certified teachers, they provide core subjects comparable to those found in the public schools, they utilize secular textbooks suitable for use in public school classrooms, they meet the secular accreditation standards of the University of Michigan and their graduates meet the secular requirements for admission to public institutions of higher education. (J.A. 142, 145; Record, vol. IB, at 157-158, vol. VIIIA, at 480, vol. VA, at 846-847).

With respect to the effect of the religious nature of the schools on the programs at issue, the public school Shared Time teachers uniformly testified that there was no religious pressure or influence exerted upon them by nonpublic school personnel to incorporate religious matters into their teaching. (J.A. (¶160) 331). Although some public school Shared Time teachers acknowledged a religious atmosphere in some of the nonpublic schools where they provided instruction on leased premises, their consistent, uncontroverted testimony was that such an "atmosphere" had absolutely no impact or affect upon their course content or manner of teaching, and it did not cause them to introduce religion into their classes. (J.A. (¶161) 331). The public school Shared Time instructors were subject to the same evaluation program utilized by the public schools in evaluating the performance of the other teachers in the school district. The evaluation process consisted of classroom observation, in leased premises, and written evaluations by GRPS subject area supervisors that were placed in

#### [40]

In Michigan, religiously-oriented nonpublic schools perform the dual functions of providing both secular education and religious instruction. *Advisory Opinion re Constitutionality of P.A. 1970, No. 100*, 384 Mich. 82, 97-98, 180 N.W.2d 265, 270-271 (1970), *appeal dismissed*, 401 U.S. 929 (1971). Indeed, the Michigan legislature requires nonpublic schools to employ certified teachers and to teach secular subjects comparable to those taught in the public schools. Mich. Comp. Laws § 388.551 (1979); Mich. Comp. Laws § 380.1561(3)(a) (1979).



the teachers' personnel files. The purpose of the evaluations was to ascertain whether the teachers were effectively teaching the secular curriculum of the public schools. (J.A. (¶156) 330). A by-product of the evaluation process was to assure that religious views were not being advanced by GRPS teachers.

Here, unlike *Meek v. Pittenger*, we have a trial record reflecting the six-year operational history of the challenged activities on leased premises. Based on that record, it is clear that the fears expressed in *Meek*, concerning the potential advancement of religion by public school teachers were not realized. In short, the challenged programs helped teach students how to read and how to add, not how to pray. The GRPS simply provided discrete, secular educational benefits to part-time public school students through course offerings taught by public school teachers on leased premises.

## 2. No Transfer of Financial Responsibility.

The Court of Appeals majority quoted the District Court's statement that:

Another glaring nonsecular effect of the programs is that *financial responsibility* for teaching Physical Education, Art, Music, and all of the other available course offerings *has been transferred from the private religious schools to the taxpayers. . . .*

(24a) (emphasis supplied). That statement is both contrary to the trial record and inconsistent with the express subsidiary factual findings of the lower courts since the challenged programs did not relieve the nonpublic schools of the expense of doing anything.

The School Code of 1976, Mich. Comp. Laws § 380.1 *et seq* (1979), contains no requirement that the courses at issue must

either be completed for graduation, or, that they must be offered by nonpublic schools. (J.A. 172-177). Clearly, the supplemental GRPS instruction which is the subject of this appeal did not relieve the nonpublic schools of their legal requirement to provide a secular core curriculum. *Mich. Comp. Laws* § 380. 1561(3)(a) (1979). (50a).

The GRPS Shared Time elementary level courses were not previously offered in the area nonpublic schools. (J.A. (¶34) 303, (¶35) 304). None of those courses were required for either graduation or progression from grade to grade by the nonpublic schools. (J.A. (¶36) 304). Similarly, the GRPS Community Education classes were not previously provided by any area nonpublic schools. (J.A. (¶211) 347).

The Court of Appeals majority, in adopting the trial court's statement of facts, concluded:

The specific courses available through the elementary level Shared Time programs *would not otherwise be available in any of the nonpublic schools, and are not required for graduation or progression to the next grade.*

(7a) (emphasis supplied).

Of the nonpublic schools presently participating in the Community Education program, none have ever provided an identical course to their students. In that respect, Community Education courses *do not represent substitutes for courses formerly offered at nonpublic schools.*

(9a) (emphasis supplied). Accordingly, based upon the trial record, the lower courts' own subsidiary findings and logic, the contention that there was a transfer of financial responsibility is patently incorrect.



In any event, the transfer of financial responsibility argument arises without regard to the location at which educational services are provided. In *Wolman v. Walter*, 433 U.S. 229, 246-248 (1977), this Court rejected the claim that providing therapeutic, guidance and remedial services to classes composed solely of nonpublic school pupils, off the premises of the nonpublic schools, constituted direct aid to sectarian institutions. Consistent with the *Wolman* analysis, the instant educational services do not constitute general assistance to religiously-oriented nonpublic schools with the primary effect of advancing or endorsing religion.

In *Everson v. Board of Education*, 330 U.S. 1, 17 (1947), and *Board of Education v. Allen*, 392 U.S. 236, 244 (1968), it was acknowledged that perhaps state paid bus fares and free textbooks might increase the attendance at sectarian nonpublic schools. However, that speculative possibility was an insufficient basis upon which to conclude that a primary effect of either program was to advance religion.

Here, as Judge Krupansky observed, based upon the uncontroverted record:

At best, the Community Education and Shared Time programs permit the nonpublic schools to offer an expanded supplemental curriculum at the facilities in issue. *There is no evidence of record, however, that this expanded curriculum has resulted in an increase in the enrollment of the participating institutions. In fact, the percentage of school age children in Grand Rapids attending nonpublic schools has remained within 1 percentage point of 30% from 1971 (5 years prior to implementation of the Shared Time and Community Education programs in 1976) to 1981.* The district court entered no finding nor is there support in the record that the nonpublic schools involved were economically distressed or that the

challenged programs provided an economic lifeline to sectarian institutions. Rather, the record discloses that said institutions enjoyed and continue to enjoy economic self-sufficiency. In sum, there is no evidence that the sectarian institutions were relieved of fiscal responsibilities or depended upon the challenged programs for economic survival.

(51a); (J.A. 215-221, (§239) 353, (§246) 357, (§247) 357) (emphasis supplied).

There was no *transfer* of financial responsibility. Nonpublic school enrollments did not increase. No nonpublic schools were saved from closing for financial reasons. These programs simply expanded the range of secular educational opportunities available to nonpublic school students as part of a general community-wide effort on the part of the GRPS to provide supplemental, secular educational benefits to all children in the community, thereby enhancing their ability to profit from the core curriculums of their respective schools of primary attendance.

### 3. Community-wide Class of Beneficiaries.

The GRPS decision to institute the Shared Time and Community Education programs was motivated by a desire to make supplemental educational opportunities found in the public schools equally available to those students attending nonpublic schools. Indeed, plaintiffs' counsel in this case conceded at trial that:

We don't claim in this case that courses that are being offered in the nonpublic schools are not available in the public schools.

(J.A. 178). The record establishes that full-time public school students have the same instructional services available to them

that were provided to part-time public school students in the Shared Time and Community Education programs. (J.A. (¶40) 305, (¶210) 347). The District Court observed that “[t]he educational programs at issue are certainly consistent with the School District’s Philosophy of Education, which is dedicated to the provision of secular educational opportunities for the entire community.” (94a). The appellate majority, in adopting the trial court’s statement of facts (4a), observed:

Shared Time is a program wherein the school district offers substantive courses *from its general curriculum* to nonpublic school students during regular school hours.

(6a) (emphasis supplied).

Although certain Community Education courses offered at non-public school sites are not offered at the public schools on a Community Education basis, *all Community Education programs are otherwise available at the public schools*, usually as part of their more extensive regular curriculum.

(9a) (emphasis supplied).

In light of the foregoing, the conclusion of the courts that “[t]he challenged programs impact upon a very narrow religious class of beneficiaries” (23a) cannot be sustained. That conclusion is contrary to plaintiffs’ claims, at odds with the trial record, and even inconsistent with the findings of the lower courts.

Here, like the child benefit programs sustained in *Everson* and *Allen*, the class of beneficiaries included all school children within the community, both full-time public school students and part-time public school students who also attended either religiously-oriented or secular nonpublic schools. *See also Mueller v. Allen*, ..... U.S. ...., 103 S. Ct. 3062, 3068-69

(1983). Certainly, the class of beneficiaries here was as broad as the class of beneficiaries upheld in *Wolman*, 433 U.S. at 241 n.9, 244 n.12, i.e., both public and nonpublic school students.

The challenged programs neutrally provided supplemental government benefits to a broad spectrum of children, *Mueller*, 103 S. Ct. at 3068. The provision of secular educational benefits to all children in the community certainly does not communicate “a message of government endorsement or disapproval of religion.” *Lynch*, 104 S. Ct. at 1368 (O’Connor, J., concurring).

All children in nonpublic schools, secular or religious, had the opportunity to participate in the challenged programs. (J.A. 177-178, (¶41) 305). Here, Shared Time and Community Education instruction, like transportation reimbursement in *Everson* and textbooks in *Allen*, were child benefit programs made available to a broad class of both public and nonpublic school students. The beneficiaries were not designated on the basis of religion. No child was singled out by the GRPS as an “outsider” or an “insider” for exclusion or inclusion in those community-wide programs because of his or her primary school of attendance. *Lynch*, 104 S. Ct. at 1366 (O’Connor, J., concurring).

Utilizing an erroneous *per se* analysis, the lower courts prohibited the GRPS from continuing to accomplish the beneficial, secular effects of their programs. It is undisputed that the public school teachers did not advance the religious views of the nonpublic schools. Further, the GRPS did not relieve the nonpublic schools from providing any classes that the nonpublic schools previously provided. The educational services were made available by the GRPS to a community-wide class of beneficiaries. As such, the challenged programs did not have the impermissible primary effect of advancing or



endorsing religion in contravention of the establishment clause. Indeed, by making these educational services available to all Grand Rapids children, GRPS avoided marking some as "outsiders, not full members of the political community," *Lynch*, 104 S. Ct. at 1366, (O'Connor, J., concurring), because of their parents' choice of school for religious or other reasons. See generally *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

#### D. The Excessive Entanglement Portion of the Test.

Respecting the issue of excessive administrative entanglement, the majority below, applying an abstract, "catch-22"<sup>[41]</sup> *per se* geographic rule of law, concluded that the provision of instruction on leased premises is necessarily impermissible under the entanglement analysis. Such an approach, petitioners submit, is contrary to the teachings of this Court in *Lynch*, *Wheeler*, *Wolman*, and *Regan*, and the better reasoned opinions of the lower courts. See, e.g., *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980); *Felton v. Secretary, United States Department of Education*, No. 78 CV 1750 (E.R.N.) (E.D.N.Y., October 4, 1983). These cases clearly require a detailed analysis of the record evidence rather than the mechanical application of a *per se* rule. The entanglement standard requires an analysis of the actual relationships between the public and nonpublic school personnel in order to determine whether such relationships give rise to the "excessive entanglement" proscribed by

[41]

Based on its conclusion that there was a "real need for monitoring to insure that religious views are not advanced," the majority concluded:

Without such monitoring the programs run the risk of enhancing religious views. If courses are monitored, the programs are still infirm in that an excessive administrative entanglement is necessitated. In either case, the same ultimate result applies and the programs cannot be sustained.

(32a).

the Constitution. To be sure, *some* "entanglement" between church and state is inevitable and constitutionally permissible. *Lynch*, 104 S. Ct. at 1364; *Hunt v. McNair*, 413 U.S. 734 (1973); *Mueller v. Allen*. The ultimate concern is to avoid that "excessive" administrative entanglement between "the government and the religious authority" which would permit "the intrusion of either into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. at 614, 615.

In delineating between permissible and excessive administrative entanglement, this Court has identified three pertinent areas of inquiry: (1) the character and purpose of the institutions benefited, (2) the nature of the aid which the state provides, and (3) the resulting relationship between the government and the religious authority. *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*.

#### 1. The Character and Purpose of the Affected Institutions.

It is the educationally needy or gifted children, and *not* the institutions which they attend, who were the beneficiaries of the programs. However, because the administration of the programs involved some minimal contact between the public school district and nonpublic school officials, the extent to which these schools may be described as pervasively sectarian is of some limited relevance.

In many respects, the nonpublic schools whose children receive the benefits conferred by the instant programs do not fit the profile of the schools described in *Meek* and *Lemon*.<sup>[42]</sup>

[42]

Interestingly, the Baptist schools, which clearly fit the profile criteria and opted not to permit any of their children to receive Shared Time instruction because of their unwillingness to accept public school control, are the fastest growing nonpublic schools in the Grand Rapids community. (J.A. (¶¶293-300) 373-377).



These schools are not church governed, but rather, are controlled by elected, lay boards of education and membership on such boards is not restricted by religious affiliation;<sup>[43]</sup> they do not limit student admissions on the basis of religion;<sup>[44]</sup> they do not limit staff hirings on the basis of religion;<sup>[45]</sup> they do not impose religious restrictions regarding the teaching of secular subjects;<sup>[46]</sup> such schools do not inculcate religion or force students to accept or reject any particular religious doctrine;<sup>[47]</sup> these schools provide religious instruction separate and apart from their secular educational function, and no student is forced to participate in religious worship;<sup>[48]</sup> and

[43]

Catholic: J.A. 106, 115-116.

Christian: J.A. 133-134.

Lutheran: J.A. 147-148.

For additional record references regarding the pervasively sectarian issue, see J.A. 362-373.

[44]

Catholic: J.A. 107, 112-113.

Christian: J.A. 136.

Lutheran: J.A. 148.

[45]

Catholic: J.A. 117.

Christian: J.A. 135.

Lutheran: Contrast J.A. 151.

[46]

Catholic: J.A. 116-117.

Christian: J.A. 134-135.

Lutheran: J.A. 151-152.

[47]

Catholic: J.A. 114-115.

Christian: J.A. 135.

Lutheran: J.A. 150-152.

[48]

Catholic: J.A. 113-114.

Christian: J.A. 134-135.

Lutheran: J.A. 149-150.

these schools have a dual purpose of providing both secular and religious instruction.<sup>[49]</sup>

Even assuming *arguendo* the existence of a pervasively sectarian atmosphere, the undisputed testimony of the Shared Time teachers was that they did not teach religion (J.A. (¶159) 331), and that neither they nor their work had been in any way affected or influenced by the atmosphere in the nonpublic schools in which they taught. (J.A. (¶¶160-161) 331). In terms of course content, teaching methodology and their goals and aspirations for their students, what took place in those programs was identical to the same instructional offerings made available to full-time public school students. (J.A. (¶40) 305, (¶210) 347). These teachers did not teach religion and no pressure or influence was exerted upon them to incorporate or include such matters in the subject areas which they taught.

In ultimately concluding that the GRPS programs violated the entanglement portion of the test, the District Court and the Court of Appeals disregarded the six-year operational history and instead relied upon a hypothetical concern regarding the *potential* for the advancement of religious views or intrusive monitoring. As noted by the Court in *Regan*:

On its face, therefore, the New York plan suggests no excessive entanglement, and *we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated.*

444 U.S. at 660-661 (emphasis supplied).

[49]

Catholic: J.A. 110-113.

Christian: J.A. 134.

Lutheran: J.A. 149.

## 2. Form of the Aid.

Assuming, *arguendo*, that the nonpublic schools in which services were offered shared some of the characteristics of the "pervasively sectarian" schools described in *Lemon* and *Meek*, the form of the aid provided was such that it did not give rise to the risk of fostering religion or excessive administrative entanglement.

Unlike most of the educational assistance cases decided in the 1970's, the recipients of the services and opportunities provided by these programs were children and not institutions. In the GRPS context, the educational services were provided by publicly employed teaching specialists (J.A. (¶147) 328, (¶222) 350), who provided their services in public school classrooms leased by the GRPS. (J.A. (¶127) 322). These teachers were subject solely to GRPS supervision and control. Nor, as these teachers testified, were they subject to the actual control or supervision of any nonpublic school administrators.<sup>[50]</sup>

In *Meek*, although the teaching personnel involved were also public school employees, this Court nonetheless felt compelled to invalidate the programs. That conclusion is inappropriate here for two basic reasons. First, because the program in *Meek* had only recently been implemented, the Court's observation was necessarily based on a record that was sparse or silent on how the publicly employed teachers performed their services, how they were supervised, and what relationships or contacts existed with nonpublic school authorities — factors which are essential in factually evaluating the actual risk of impermissibly fostering religion. By contrast, the Grand Rapids programs had been in operation for some six years,

[50]

The nonpublic school administrators consistently testified that they understood the guidelines for the programs. (J.A. (¶¶201-202) 344-345).

and the extensive factual record developed speaks loudly to the absence of any such risk. Second, the Grand Rapids programs at issue here were provided for part-time public school students in *leased* premises under conditions of *public school control*. Public schools may, of course, use a lease to acquire and control needed classrooms. See *Nebraska State Board of Education v. School District*, 409 U.S. 921, 925-26 (Brennan, J., concurring), *denying cert. to School District v. Nebraska State Board of Education*, 188 Neb. 1, 195 N.W.2d 161 (1972).

Over 90% of the teachers providing services through the Shared Time<sup>[51]</sup> instructional program did not have a work history which included employment with Grand Rapids nonpublic schools. (J.A. 193-194). In addition, the itinerant Shared Time teachers were usually assigned a variety of locations, including premises both owned and leased by the GRPS. (J.A. 63, 68, 85-86, 95, 102; Record, vol. VIIB, at 1223). These facts reduced the danger referred to in *Meek* that public school employees might introduce religion into their classes.

The unchallenged testimony of GRPS administrators, teachers, and support professionals removes any concern that these courses could be used to foster religion. Not only did those teachers perform their services in a religiously-neutral setting, *i.e.*, a leased classroom free of religious symbolism, but also, they were routinely provided with administrative guidelines which clearly outlined the nature and extent of public school control. (J.A. (¶166) 333, (¶167) 335). Furthermore, the

[51]

As explained earlier, virtually all of the Community Education teachers who taught in the after-school program otherwise taught for the area nonpublic schools during the regular school day. However, the nature of the subject matter taught (*i.e.*, rug hooking, model building, etc.) greatly removes the concern that religion may become a part of the instruction provided. Surely, there is no greater risk of the teacher advancing religion in teaching rug hooking after school than there is in providing diagnostic services. See *Wolman*.



GRPS not only provided such guidelines for their teachers, but also furnished nonpublic school administrators with copies of those guidelines so there would be no question concerning the terms and conditions of public school control under which the programs would be offered. (J.A. (¶175) 338, (¶202) 344-345).

GRPS teachers were reminded that they were public school employees, not employees of the nonpublic schools where they performed a portion of their teaching services. They were told that they were not subject to the supervision, control or evaluation of nonpublic school administrators, but rather, were solely responsible for what they taught and how they taught it to their public school area supervisors. They were told that these programs represented supplemental, secular instructional opportunities for children which were provided over and above the core curriculum of the nonpublic schools. (J.A. 214, (¶166) 333). They were told that the courses which they taught should not and may not serve as a substitute for the regular instructional programs of the nonpublic schools, and further, that they were not to teach religion. (J.A. (¶167) 335). They were all required to follow the GRPS curriculum and further, were required to use exclusively GRPS supplies and materials. These items were required to be stored separately from the supplies and materials in nonpublic schools in which they taught, and they were also required to be appropriately labeled as public school property. (J.A. (¶¶188-192) 341-342).

Thus, unlike *Meek*, this Court has the benefit of a detailed factual record which sets forth how the programs operated over a long period of time. That record amply demonstrates that since the implementation of these programs, there have been no instances in which GRPS teachers have ever taught or tried to teach religious topics, nor was there any evidence to suggest that such teachers became involved in the religious activities of the nonpublic schools. Quite to the contrary, the

teachers uniformly testified that they neither felt pressured nor influenced to incorporate religious matters, and further, that the religious atmosphere, to the extent they perceived it, had no affect or impact upon what they taught, how they taught, or the academic goals which they had for their students.

In sum, the evidence in this case conclusively demonstrated that the form of aid challenged presented no cognizable risk of the "impermissible fostering of religion" by Shared Time and Community Education teachers, and that there was, therefore, no need for the type of intrusive "continuing surveillance" thought necessary in *Meek*. The factual record regarding the six-year history of these programs dispels in reality what the *Meek* Court feared hypothetically. In concluding otherwise, the District Court and the Court of Appeals erred reversibly in applying their *per se* methodology.

### 3. Relationship Between GRPS and Nonpublic School Administrators in the Operation of the Programs.

The GRPS concluded that the most educationally effective and administratively feasible way to provide supplemental instruction to educationally needy and gifted students attending area nonpublic schools was to provide such instruction in leased facilities where the children were receiving their basic education. The record evidence adduced at trial identified two different types of administrative relationships which arose in the implementation and operation of the programs: (1) the supervision and evaluation of GRPS teachers by other public school administrators (*i.e.*, subject area supervisors), and (2) routine administrative contacts between the Shared Time and Community Education director and the nonpublic school administrators. The first of these relationships existed exclusively between *public* school employees, and not between



the government and religious authorities.<sup>[52]</sup> The second of these relationships, though involving contacts between government and religiously-oriented nonpublic schools, nonetheless amounted to merely routine and infrequent contacts designed to meet the "logistical difficulties of extending needed and desired aid to all children of the community." *Wolman v. Walter*, 433 U.S. at 247 n.14. These limited administrative contacts between "church and state" did not result in the "intrusion of either [church or state] into the precincts of the other," the primary evil which the entanglement test was designed to prevent. *Lemon v. Kurtzman*, 403 U.S. at 614.

The evidence revealed that the contacts between Shared Time and Community Education officials and the nonpublic school administrators fell into three basic categories: (1) the distribution of information regarding the available educational services; (2) the processing of requests for the receipt of such educational services; and (3) resolving scheduling problems and related matters which arose in the delivery of the services.

Recognizing that the majority below failed to utilize an analysis consistent with recent decisions of this Court, Judge Krupansky observed that the majority predicated its conclusion of inevitable excessive entanglement "upon the theory that the Shared Time and Community Education programs created a *potential* for the advancement of religious ideologies generating a need to monitor the instructors to insure neutrality." (55a) (emphasis supplied). Utilizing this *per se* rule, the

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As noted by Justice Blackmun in *Wolman v. Walter*:

It can hardly be said that the supervision of *public* employees performing *public* functions on *public* property creates an excessive entanglement between church and state.

433 U.S. at 248 (emphasis supplied).

majority analyzed the constitutionality of the services in question in a manner "totally incongruent with the flexible nature of the establishment clause." (55a). As observed by Judge Krupansky:

The 'entanglement' test initially pronounced in *Lemon, supra*, presupposes the existence of a potential for the advancement of religious ideologies. It has typically been utilized where there is no record as to the presence or absence of religious advancement during the course of the challenged program's administration; in such instances the court simply identifies the entanglement which would be necessary to assure that the potential for advancement is not realized. *See, e.g., Nyquist, supra*.

... In the action *sub judice* no instructor during the 6-year period at issue has ever utilized or attempted to utilize the Shared Time and Community Education programs as a vehicle for religious indoctrination. There is no reason to believe that continued implementation of these challenged programs will deviate from this firmly established practice in the future. At this point in the history of the programs' operations, and in light of the exhaustive record, it is beyond peradventure that there never was a necessity to monitor the program in the past and accordingly every reason to believe that the need will not

arise in the future. Without such monitoring or need to monitor, no 'entanglement' manifests.<sup>[53]</sup>

(55a-56a).

As this Court noted in *Regan*, it is improper to accept "as an inevitability the bad faith upon which any future excessive entanglement would be predicated." 444 U.S. at 660-661 (footnote omitted). Respondents had the burden of proving the existence of excessive entanglement between government and religion. Respondents did not produce any record evidence of intrusive monitoring or other friction between public and nonpublic school personnel resulting in excessive entanglement under the establishment clause.

## II.

### THE RIGID APPLICATION OF PER SE RULES BY THE COURT OF APPEALS MAJORITY DEPRIVES STATES AND LOCAL SCHOOL DISTRICTS OF THE FLEXIBILITY NEEDED TO SOLVE THE LOGISTICAL DIFFICULTIES OF MEETING THE SECULAR EDUCATIONAL NEEDS OF ALL THEIR SCHOOL AGE CHILDREN.

Under our federal system of government, the primary responsibility for providing educational opportunities for our

<sup>[53]</sup>

In similarly addressing the issue of political entanglement, Judge Krupansky concluded:

The foregoing rationale applies with equal force to the issue of 'political entanglement'. There is no evidence of record to support the proposition that any political divisiveness has resulted in response to the Shared Time and Community Education programs.

(56a). See J.A. 155, (¶¶248-250) 357-358. In any event, in its recent decisions this Court has articulated the rule that inquiry into the potential for political entanglement does not arise unless the program

nation's youth is reposed in the states and their local school districts. In exercising this responsibility, the states and local school districts serve as laboratories for experimentation "to tailor local programs to local needs." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973). The 2-1 decision of the Court of Appeals panel, through the use of a *per se* prohibition on the use of leased premises, has severely constrained the ability of the GRPS to respond to the educational needs of all its students.

The Michigan legislature has authorized local school districts to address the special and supplemental secular educational needs of all school age children. To that end, the Michigan legislature has provided payment of state school aid funds to school districts for full-time and part-time public school students regardless of whether their public school instruction occurs on premises owned or leased by local school boards. (72a-73a). The section of the State School Aid Act of 1979 that appropriates state funds to school districts on a per membership pupil basis utilizes a statutory allocation formula without any total dollar limit. See *Mich. Comp. Laws* § 388.1621 (1979) (amended 1982). Each year, the Michigan Department of Education applies the automatic statutory formula to the pupil memberships reported by each school district and distributes state funds to the local districts on that basis. There is no separate legislative appropriation for part-time public school instruction on premises leased from non-public schools. Accordingly, there is no annual political debate over the level of appropriation for such instruction. (J.A. 152-155).

at issue provides "a direct subsidy to church-sponsored schools or colleges, or other religious institutions," *Lynch*, 104 S. Ct. 1364-65; *Mueller v. Allen*, 103 S. Ct. at 3071 n.11, a situation which does not obtain in this case.



This legislative judgment reflects a policy decision to permit local school districts to adopt a variety of methods, including the use of leased premises, to meet the educational needs of their children in a manner compatible with the particular community environment.<sup>[54]</sup> The large measure of local control present in Michigan's educational structure is thereby enhanced. *Milliken v. Bradley*, 418 U.S. 717, 742 (1974).

The GRPS elected to utilize the helpful alternative of leased premises to reach out to all students in the community, including the 30% who otherwise attended nonpublic schools. (51a). The Court of Appeals majority decision invalidated this valuable educational option by erroneously applying a wooden, mechanical *per se* rule based simply on the location at which such educational services were provided. Yet, the record establishes that, for Grand Rapids, this arrangement had worked well for over six years and had provided a quality education for the community's youngsters without any of the problems hypothesized by the Court of Appeals. Before the judiciary deprives a local community of such an important option, it ought to insist, even when the important concerns of the establishment clause are at stake, that such restrictions are required by the record in the case. Here, however, the record describes a carefully developed and administered program, well-grounded in the community and serving the educational needs of that community. Any constitutional attack on that

[54]

Apparently, the Court of Appeals majority decision was prompted in part by its own policy priorities, including a perceived need to protect public education from the hypothesized expansion of private education. (40a). As demonstrated above, the stable school enrollment figures of the Grand Rapids community simply do not provide any basis for that hypothesis. More importantly, it is hardly the role of the establishment clause—or of the judiciary—to serve as a vehicle for enhancing one educational choice over another. *Cf.*, *Pierce v. Society of Sisters*.

program must deal with the reality embodied in that record and not with hypothetical fears and conjecture. Constitutional invalidation of state programs ought not be "premised upon unfounded assumptions about how people live." *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting).

### III.

#### THE MAJORITY RULING BELOW SHOULD BE REVERSED BECAUSE OF ITS FAILURE TO LIMIT RESPONDENTS' TAXPAYER STANDING SOLELY TO CHALLENGES OF LEGISLATIVE APPROPRIATIONS AS REQUIRED BY THIS COURT'S DETERMINATIONS IN FLAST AND VALLEY FORGE.

Respondents' reliance on conjecture and a *per se* rule rather than on the actual record should not be surprising. They simply have suffered no personal injury as a result of these programs and therefore cannot even present "that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions." *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)) (emphasis supplied).

Respondents do not appear as parents of children involved in the challenged programs, nor do they assert any other particularized injury.<sup>[55]</sup> Their sole basis for standing to attack

[55]

Respondents' allegation that the programs are "contrary to [their] religious consciences" (Complaint, ¶21, J.A. 7), amounting to no more than an assertion that plaintiffs "[suffer] in some indefinite way in common with people generally," *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), does not rise to the level of an Article III injury. *Valley Forge*, 454 U.S. at 485. A mere "religious difference," even on the part of a taxpayer, is an insufficient basis for Article III standing. *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).



the programs of the GRPS is their status as citizens and taxpayers. In *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464 (1982), this Court revisited its earlier holdings dealing with taxpayer standing. It emphasized that, unless anchored in the basic requirement that the plaintiff demonstrate "some actual or threatened injury," *Id.* at 472 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)), taxpayer standing could easily transform the federal court into "a forum in which to air . . . generalized grievances about the conduct of government." *Valley Forge*, 454 U.S. at 479 (citing *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). Consequently, a litigant has standing *as a taxpayer* not to assert an "interest in the use of funds," but only to assert that, *as a taxpayer*, he is in "danger of suffering . . . [a] particular concrete injury," *United States v. Richardson*, 418 U.S. 166, 177 (1974), "by virtue of his liability for taxes." *Valley Forge*, 454 U.S. at 478. For such "taxpayer injury" to exist, the prospective litigant must demonstrate that he is alleging an unconstitutional exercise of the congressional power under the taxing and spending clause of the federal constitution or its state analogue and further allege that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power. *Flast v. Cohen*, 392 U.S. 83 (1968).

Like the plaintiffs in *Richardson* and *Valley Forge*, the respondents fail to meet the first requirement. The action they challenge is not an exercise of the taxing and spending power by the Michigan legislature but a decision by local authorities to implement the programs at issue by the use of the funds made available by the state legislature. The applicable Michigan statutes do not require that such programs be initiated by local authorities. Nor do they expressly address the question as to whether the programs may be carried out in classrooms leased from nonpublic schools. (70a-73a) (J.A.

152-159). Both decisions are made at the local level. Yet the program is entirely funded by state appropriations.

Respondents would fare no better were they to characterize themselves as local, rather than state, taxpayers. First of all, such a characterization is inappropriate. Dr. Vrugink, the Deputy Superintendent, testified without refutation:

THE COURT: Well witness, I think what I want to know is whether or not the shared time program and community education program is costing the taxpayer and the Grand Rapids School District any money?

THE WITNESS: The answer is no.

Q. (Mr. Dilley) You are getting all the money to finance that from state aid?

A. Yes.

(Record, vol. VB, at 948). Accordingly, plaintiffs' taxpayer standing must be that of state, not local, taxpayers.

Even assuming *arguendo* that local taxpayer status is appropriate, the respondents were not injured by the state-funded program. Indeed, as local taxpayers, the respondents benefited under the Michigan school funding structure since the local school district actually received more state funds for every part-time public school child than was necessary to conduct the programs at issue. (74a n.6) (J.A. (¶238) 354). The difference eased the overall burden on the local taxpayer. Cf. *Valley Forge*, 454 U.S. at 480 n.17.

Respondents' complaint presents, therefore, precisely the kind of situation which this Court's constraints on taxpayer standing were designed to avoid. Like the plaintiffs in *Frothingham*, *Richardson* and *Valley Forge*, the respondents

simply express disagreement with how the government is managing its assets. They assert only "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485. They have not alleged any cognizable injury to them as taxpayers. They simply seek "a special license to roam in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487 (footnote omitted).

### CONCLUSION

In our interdependent democratic society, we all have an interest in the secular education of each other. This interest is effectuated by the states and their local school districts within our flexible federal system. The GRPS have devised local programs to meet local needs within the framework of state law. These local secular educational innovations should not be prohibited by a *per se* application of the establishment clause. Here, the respondents have not shown that the programs violated any aspect of the three-part *Lemon* test or the underlying policy concerns of the establishment clause. Thus, this Court should sustain the supplemental child benefit programs as constitutionally permissible.

Thirty percent of the school age children in the Grand Rapids community attend nonpublic schools. The establishment clause should not render these students constitutional "outsiders" ineligible for discrete, supplemental, secular educational assistance by public school authorities. The significance of these educational benefits is exemplified by the poignant trial testimony of a mother of two children (who received remedial reading instruction through the Shared Time program), when she stated:

- Q. Without this kind of skill, your two sons would not have been able to learn as well as they are now learning, would they?
- A. Right. And not only learning, but their whole self esteem was involved with this. If you could see the difference between the first year of first grade with my oldest son and the second year of first grade, there is just remarkable improvement. He was, his who[le] nature has come out. He's much more happy, much more adjusted. *I hate to think what would have happened to him, if he had not had this extra help.*

(Record, vol. VIII B, at 1392-1393) (emphasis supplied). Petitioners, by this appeal, seek this Court's approval to once again provide these benefits to all educationally needy and gifted students in the Grand Rapids community.

For the foregoing reasons, the petitioners respectfully request a reversal of the decision of the United States Court of Appeals for the Sixth Circuit.

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CLERK

No. 83-990

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

THE SCHOOL DISTRICT OF THE CITY  
OF GRAND RAPIDS, *et al.*,

*Petitioners,*

v.

PHYLLIS BALL, *et al.*,

*Respondents.*

On Writ Of Certiorari To The United States  
Court Of Appeals For The Sixth Circuit

**BRIEF OF THE UNITED STATES CATHOLIC  
CONFERENCE AS AMICUS CURIAE IN  
SUPPORT OF PETITIONERS**

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**BRIEF OF THE UNITED STATES CATHOLIC  
CONFERENCE AS *AMICUS CURIAE* IN  
SUPPORT OF PETITIONERS**

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**INTEREST OF AMICUS**

The United States Catholic Conference ("USCC") is a non-profit corporation whose members are all the Catholic Bishops in the United States. The interests of the USCC include the areas of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, youth activities, and communications, with emphasis on the preservation of religious liberty. When deemed appropriate and permitted by court rules or practice, the USCC offers its views in litigation touching important socio-moral and other issues pertinent to its areas of activity, particularly when they may affect the Catholic Church or its people in the United States. Through their counsel, all parties have consented to the appearance of this *amicus*.

The United States Court of Appeals for the Sixth Circuit has held that the provision of Shared Time and Community Education courses on premises leased from religiously affiliated non-public schools violates the Establishment Clause of the First Amendment.<sup>1</sup> The courses are limited to secular subjects and are taught by employees of the School District of the City of Grand Rapids. A reversal of the Court of Appeals would enable the School District to fulfill the responsibility it has undertaken to provide important educational services to children within its community, including those attending religiously affiliated schools, Catholic and others.

### SUMMARY OF ARGUMENT

The secular courses offered by the School District of the City of Grand Rapids to children attending nonpublic, religiously affiliated schools are clearly sustainable under the relevant decisions of this Court. This *amicus* will not repeat Petitioner's arguments supporting that conclusion. Rather, it will attempt to serve the Court by suggesting an approach to the three-part *Lemon* test<sup>2</sup> which (a) emphasizes the vital public interest in education of youth and (b) requires a demonstrable, concrete threat to authentic constitutional values before the Establishment Clause is interposed to subvert important educational programs.

Long ago Chief Justice John Marshall counselled that lawful legislation should not be invalidated for constitutional reasons on the basis of "slight implication and vague conjecture." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1809). This admonition underscores well the need for a concrete threat to authentic Establishment Clause values before that Clause is utilized to subvert the legitimate efforts of government in the important area of educa-

<sup>1</sup> U.S. Constitution Amendment I provides in relevant part that "Congress shall make no law respecting an establishment of religion. . . ."

<sup>2</sup> As stated in *Lemon v. Kurtzman*, the test is: First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and third, the statute must not foster an excessive government entanglement with religion. 403 U.S. 602, 612-13 (1971).

tion. The three-part test can be a valid constitutional standard only when it is rooted in the authentic objectives of the Establishment Clause, according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 104 S. Ct. 1355, 1359 (1984).

The words of the Establishment Clause represent a compromise between the versions finally approved by the House and Senate during the First Congress. The House and Senate proceedings which forged the language of the Clause demonstrate, as Madison himself explained during the House debate, that the objective was to forbid the establishment or preferment of one or more religions by the new federal government. History had taught the founders that such conditions lead to infringement of religious liberty. Analysis of those proceedings illumines the words of the Clause to the point of undeniable clarity of purpose.

The Establishment Clause was meant to lay down a principle. Its explicit proscriptions against establishment and preferment constitute the precise judgment of the framers. They did not explicitly or impliedly classify aid to religion, churches or religious groups as inherently objectionable, hardly surprising given the diverse values and practices of the day. This conclusion is reinforced by actions of the First Congress (*e.g.*, appointment of paid Congressional chaplains) and other early acts of the federal government (*e.g.*, issuance of patents for land, without charge, to religious organizations, and providing funds to support schools to educate Indians operated by various religious organizations).

The seminal cases, notably *Everson v. Board of Education*, 330 U.S. 1 (1947), blurred the constitutional vision by attributing to the Establishment Clause a broad, no-aid-to-religion purpose. The Court has cautioned against undue reliance on the *Everson* dicta, and pursued the common sense course of benevolent neutrality. Nonetheless, *Everson's* conclusions have influenced the application of the three-part test, resulting at times in the invalidation of programs involving no concrete threat of establishing religion within the meaning of the Establishment Clause, *e.g.*, field trip transportation to government and cultural centers [*Wolman v. Walter*, 433 U.S. 229, 254 (1977)]; loans of secular educational materials (*e.g.*, maps, charts, and laboratory equip-



ment) [*Meek v. Pittenger*, 421 U.S. 349, 365 (1975)]; and payments for state-mandated services [*Levitt v. Committee For Public Education and Religious Liberty*, 413 U.S. 472 (1973)].

The Court's recent cases make clear that the contours of Establishment Clause analysis are still evolving. This *amicus* suggests that Establishment Clause analysis will be enhanced by applying the three-part test so as to:

1. give great weight to the important public interest served by the government action which is said to offend the Establishment Clause [*Secular Purpose Test*], and
2. require a *showing* of a concrete threat to authentic Establishment Clause values which obliges the Court to subvert the exercise of constitutional authority by state and local governments [*Primary Effect and Excessive Entanglement Tests*].

This *amicus* respectfully submits that more vigorous demands upon challenges to otherwise legitimate and necessary public acts will accord with the wisdom of Chief Justice John Marshall and, in the end, best serve society's interest in meeting its needs while avoiding real establishment concerns.

## ARGUMENT

### I

**THE "THREE-PART" TEST INVOLVES A "TWO-PART" ISSUE AND SHOULD BE REASSESSED. THE CONSTITUTIONAL AUTHORITY OF STATE AND LOCAL GOVERNMENTS TO PROVIDE FOR THE EDUCATION OF YOUTH FURTHERS A VITAL NATIONAL INTEREST [SECULAR PURPOSE] WHICH SHOULD NOT BE UNDERMINED EXCEPT TO THWART CONCRETE THREATS TO AUTHENTIC CONSTITUTIONAL VALUES [PRIMARY EFFECT/EXCESSIVE ENTANGLEMENT].**

The "three-part" test was first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The results of its application strongly suggest the need to reassess its efficacy as an analytical tool. The Court has candidly recognized the inherent limitations of the test:

"[T]he tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as

guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."

*Meek v. Pittenger*, 421 U.S. 349, 359 (citation omitted) (1975); cf. *Mueller v. Allen*, 103 S. Ct. 3062, 3066 (1983); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971). The Court has also pointedly observed that the flexibility of approach so evident in the cases awaits a "more encompassing construction of the Establishment Clause." *Committee For Public Ed., Etc. v. Regan*, 444 U.S. 646, 662 (1980).

Although the contours of analysis remain in flux, the Court's most recent decisions have placed appropriate emphasis on the authentic purposes of the Establishment Clause as they are rooted in its history. That has led not only to the enhancement of the "three-part" test [*Mueller v. Allen*, 103 S. Ct. 3062 (1983); *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984)], but also to the resolution of issues without recourse to it. *Marsh v. Chambers*, 103 S. Ct. 3330 (1983). The utility of the "three-part" test may justifiably be questioned. Surely it has wrought the invalidation of public acts with concededly secular purposes and undeniably worthy social ends. In all events, however, what matters is the Court's renewed insistence that public acts for the common good shall be upheld save in those rare cases involving a concrete threat to authentic constitutional values.

In the end, the question is whether the state has exercised its constitutional authority in a way that so trenches upon authentic Establishment Clause values that the Court is obliged by constitutional duty to defeat its legitimate objectives. Cf. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

**A. Establishment Clause Analysis ("Three-Part" Test) May Be Enriched By The Counsels Of Chief Justice John Marshall Which Require A Concrete Threat To Authentic Constitutional Values Before Otherwise Lawful Public Acts May Be Invalidated.**

Chief Justice John Marshall long ago counseled:

"The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative

in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility [sic] with each other."

*Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1809). The enduring wisdom of this admonition unites the principles of federalism, separation of powers, and judicial restraint. It augments the jurisprudential core for the three-part test, and reinforces the Court's insistence of late that public acts shall not be stricken save for compelling constitutional cause.

Although the Chief Justice wrote in regard to a state constitution, his wisdom applies no less to cases involving federal constitutional constraints on acts of government. "It has been repeatedly said by this Court, that to pronounce a law of one of the sovereign states of this union to be a violation of the [C]onstitution is a solemn function, demanding the gravest and most deliberate consideration." *Butler v. Commonwealth of Pennsylvania*, 51 U.S. (10 How.) 402, 415 (1850). A scrupulous fidelity to principles of federalism is of foremost importance when judging the constitutionality of state action. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 44 (1973). The delicacy of that function is attributable, in part, to the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority. *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947).

Chief Justice Marshall's formulation contains the fundamental analytical elements subsumed under the "three-part" test. On the one hand, there must be a genuine, secular or public purpose and a due regard for the constitutional authority of the people to achieve that purpose by the means they deem necessary or appropriate. On the other, those means may not pose a threat to authentic Establishment Clause values which is so real and concrete, so beyond "slight implication and vague conjecture," that the case is not "doubtful" and "the judge feels a clear and strong conviction of their in-

compatibility [sic] with each other." *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 128. The former pertains, obviously, to the "secular purpose" prong of the "three-part" test. The latter implicates the "primary effect" and "excessive entanglement" prongs, and any other means of investigation and discernment which seeks to identify serious constitutional mischief.

#### **B. The Generative History Of The Religion Clauses Clearly Reveals They Were Intended To Protect Religious Liberty Against Infringement, Including That Which Can Be Wrought By An Established State Religion.**

The authentic values and objectives of the Establishment Clause were somewhat blurred in the seminal cases because of an insufficient consideration of the illuminating House and Senate debates which forged the Clause as part of the First Amendment (discussed *infra* at 20-21). Following is the summary which was part of this *amicus*' brief in *Mueller v. Allen*, *supra*.

##### **1. Constitutional Convention Of 1787 And Ratification By States**

Religion was not a major concern of the Constitutional Convention of 1787. The only reference to religion in the proposed Constitution appeared in Article VI which provided, in part, that "no religious test shall ever be required as a qualification to any office or public trust under the United States."<sup>3</sup>

During the ratification process some states expressed concern because the Constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia<sup>4</sup> specifically addressed the issue of religious freedom. The ratifying acts of four of them (New Hampshire excepted) addressed the issue of an established religion in

<sup>3</sup> *V Debates on the Adoption of the Federal Constitution* 564 (2d ed. J. Elliot ed. 1836).

<sup>4</sup> Of these states Rhode Island and New York did not make a recommendation for a religious amendment but each did include in its ratifying act a declaration of principles which included statements on religious liberty. See notes 6 and 7 *infra*.



terms of preferring one religion over others. Virginia proposed the following amendment on June 27, 1788:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and *that no particular religious sect or society ought to be favored or established, by law, in preference to others.*<sup>5</sup> (Emphasis added.)

The scored language appeared in virtually identical form in the ratifying acts of New York,<sup>6</sup> Rhode Island,<sup>7</sup> and North Carolina.<sup>8</sup> Desirous of protecting its own religious establishment,<sup>9</sup> New Hampshire proposed an amendment reading: "Congress shall make no laws touching religion, or to infringe the rights of conscience."<sup>10</sup>

In contrast, there was substantial opinion that the explicit protection of religious liberty was unnecessary because the federal government lacked authority over religion, and because adequate protection was supplied by the ban on religious tests in Article VI and by the multiplicity of sects in the country. James Madison was among those who shared this view.<sup>11</sup>

<sup>5</sup> III Elliot, *supra* note 3, at 659.

<sup>6</sup> I *id.* at 328.

<sup>7</sup> *Id.* at 334.

<sup>8</sup> IV *id.* at 244.

<sup>9</sup> See Corwin, *The Supreme Court As National School Board*, 14 Law and Contemporary Problems, 3, 11 (1949). New Hampshire's constitution on the date it ratified the Constitution contained a provision under which the legislature could authorize towns, corporate bodies, or religious societies to make provision at their own expense for the support and maintenance of public Protestant teachers of piety, religion and morality. N.H. Const. of 1784, Pt. I, Art. I, Section VI, 4 *American Charters, Constitutions and Organic Laws—1492-1908*, 2454 (F. Thorpe ed. 1909).

<sup>10</sup> I Elliot, *supra* note 3, at 326.

<sup>11</sup> III *id.* at 330.

## 2. Textual Development Of Religion Clauses—The House

The wording of the Religion Clauses was a compromise between the House and Senate versions.<sup>12</sup> Although there is no record of debates pertaining to the compromise, there is an ample record of the House and Senate proceedings.

### <sup>12</sup> HOUSE LANGUAGE

#### *Madison's Proposal—June 8*

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

#### *Select Committee—July 18*

No religion shall be established by law, nor shall the equal rights of conscience be infringed.

#### *Livermore's Language—August 15*

Congress shall make no laws touching religion, or infringing the rights of conscience.

#### *Ames Language—August 20*

Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.

#### *Final Text—August 24*

Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

### SENATE LANGUAGE

#### *September 3*

Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.

Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.

Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

Congress shall make no law establishing religion or prohibiting the free exercise thereof.

#### *Final Text—September 9*

Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion. . . .

### COMPROMISE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .



The major proceedings in the House took place on August 15, 1789, although final action did not occur until August 24th.

*Madison Introduces First Version.* The first version of the Religion Clauses was among a number of amendments to the Constitution proposed by Madison on June 8, 1789. It provided:

The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

1 *Annals of Congress* 434 (Gales & Seaton eds. 1789) (emphasis added). He advised that many doubted amendments to the Constitution were necessary to secure individual liberty. *Id.* at 432. He also stated the amendments would "not injure the Constitution," *id.*, and were "likely to meet the concurrence [of the states] required by the Constitution." *Id.* at 433.

*Select Committee's Version.* The amendments were referred to a Select Committee. Because of the diversity of views on religious liberty among the states, it is important to note the Committee consisted of one representative (including Madison) from each state. *Id.* at 665. The Committee reported language similar to that proposed by Madison regarding establishing religion except that the word "national" had been deleted.<sup>13</sup> Deletion of that word reflected a concern that the new government might be viewed as national rather than federal, with authority over state practices beyond its enumerated powers (discussed *infra* at 14).

*Madison Explains Intent.* On August 15th the House considered the amendment reported by the Select Committee. Madison explained its meaning to be "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals* at 730. He also observed that the amendment had been required by some state conventions which feared the Constitution might have given the Congress authority to make laws that "might infringe the rights of conscience and

<sup>13</sup> National Archives and Records Service, *The Story of the Bill of Rights* 6 (1980).

establish a national religion; to prevent these effects he presumed the amendment was intended." *Id.*

*Concern Amendment Might Harm Religion.* The language of the Select Committee's proposal ("No religion shall be established by law . . .") evoked limited concern that it might be construed adversely to religion. Peter Sylvester of New York suggested the wording of the amendment "might be thought to have a tendency to abolish religion altogether." *Id.* at 729.<sup>14</sup> Benjamin Huntington of Connecticut agreed with Madison's statement of the intent, but he also expressed concern "that the words might be taken in such latitude as to be extremely harmful to the cause of religion." 1 *Annals* at 730. To illustrate, Huntington suggested the inability of a federal court to compel persons to support the religious societies to which they belonged, "for a support of ministers, or building of places of worship might be construed into a religious establishment." *Id.* At the time, Connecticut authorized religious societies to tax their members for support.<sup>15</sup>

*Madison Restates Intent.* To assuage concerns such as those expressed by Sylvester and Huntington, Madison moved to insert the word "national" before religion which he thought "would point the amendment directly to the object it was intended to prevent." 1 *Annals* at 731. He "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.*

Samual Livermore of New Hampshire was not satisfied with Madison's motion but did not elaborate on his objections *Id.* Elbridge Gerry of Massachusetts also objected to the insertion of the word "national." Gerry's discussion reflected concerns expressed by opponents of the Constitution in state ratifying con-

<sup>14</sup> At least two commentators have concluded that Sylvester thought the language might be interpreted as forbidding all governmental assistance to religion. See W. Berns, *The First Amendment and the Future of American Democracy* 8 (1976); M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment* 7 (1978).

<sup>15</sup> See I. A. Stokes, *Church and State in the United States* 411-12 (1950).

ventions that the Constitution established a national government rather than a federal government. *Id.* Madison withdrew his motion, but denied insertion of the word "national" would imply the government was a national one. *Id.*<sup>16</sup>

*Livermore's Amendment.* Livermore moved to amend the language to read "that Congress shall make no laws touching religion, or infringing the rights of conscience." 1 *Annals* at 731. This proposal is identical, except for a stylistic change, to that recommended by New Hampshire when it ratified the Constitution, *supra* at 8, and can be attributed to a desire to protect her own religious establishment.<sup>17</sup> Livermore's proposal, which passed on August 15 without any recorded debate, was not the language finally adopted by the House.

*Final House Text.* On August 20th the House passed the motion of Fisher Ames of Massachusetts (the last state to abandon an established religion in 1833) to change the wording to "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." 1 *Annals* at 765. With minor stylistic changes, it was ultimately sent to the Senate on August 24th, *Id.* at 778. The *Annals of Congress* do not record the debate, if any, on the Ames wording.

Insofar as establishment is concerned, the Ames and House versions are indistinguishable in substance from that proposed by the Select Committee. Madison's explanations of intent give importance to this fact.

### 3. Textual Development Of Religion Clauses—The Senate

On September 3rd the Senate twice agreed to amend the language approved by the House. First, it approved this lan-

<sup>16</sup> In the course of debate, Gerry had suggested that the amendment would "read better if it was that no religious doctrine shall be established by law." 1 *Annals* at 730. Roger Sherman of Connecticut thought the amendment unnecessary because Congress had no authority whatever delegated by the Constitution to make religious establishments. *Id.* Daniel Carroll of Maryland was in favor of the amendment because it would tend to conciliate the minds of those who felt the rights of conscience were not well secured under the constitution. *Id.*

<sup>17</sup> Corwin, *supra* note 9.

guage: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed."<sup>18</sup> The Senate then rejected two other versions of the amendment<sup>19</sup> and a motion that the entire amendment be stricken. I DePauw, *supra* note 18 at 151. The Senate finally approved: "Congress shall make no law establishing religion or prohibiting the free exercise thereof." *Id.*

On September 9th the Senate passed its final version, to which it added other guarantees of liberty (free speech, free press, peaceable assembly and petition). The Religion Clauses read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . . ." *Id.* at 166. There are no records of the debates in the Senate.

### 4. Ratification By The States

The Bill of Rights was ratified by the states with a notable lack of comment on the First Amendment.<sup>20</sup> Only in the Virginia Senate was concern expressed that the First Amendment was not broad enough to prevent preferential treatment among religions.<sup>21</sup>

### 5. Analysis—Establishment Clause Language

Whatever may be said of the clarity of the Establishment Clause considered *in vacuo*, its precise meaning emerges when

<sup>18</sup> 1 *Documentary History of the First Federal Congress of the United States* 151 (L. DePauw ed. 1972).

<sup>19</sup> The rejected versions were (i) "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society," and (ii) "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof nor shall the rights of conscience be infringed." *Id.*

<sup>20</sup> C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment*, 157 (1963).

<sup>21</sup> On December 12, 1789 the Virginia Senate expressed grave disappointment over the First Amendment, fearing that it would "be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia." *Journal of the Senate of the Commonwealth of Virginia, 1785-1790*, at 62-63 (1828).



the words are illumined by the process which forged them. The language purposefully and precisely effectuates the readily identifiable objectives of its framers. Had the Establishment segment of the Religion Clauses emerged in the versions previously considered in House and Senate, there would be no doubt that its objectives were the actual establishment or preference of one or more religions. That was the precise concern of four of the five states which requested such an amendment when they ratified the Constitution. That was the precise objective stated and restated by Madison as sponsor in the House.

There was no tension or doubt related to these objectives, but the choice of words to reach them did engender certain anxieties born of other concerns. References to "national" religion evoked fears of an implication that the new government would be "national" and not "federal." However, more important for present purposes was the concern that the Religion Clauses might interfere with the autonomy of the states in religious matters, particularly the states which still countenanced preferred religion to one degree or another. Except for Madison, the most active participants in the House debate (Gerry, Huntington, and Livermore) came from states (Connecticut, Massachusetts, and New Hampshire) that maintained a religious establishment in one form or another. More than one commentator has noted the importance of the national-state issue to the development of the Establishment Clause.<sup>22</sup>

As noted, the Religion Clauses are a House-Senate compromise. The task was to agree on language that would meet the major objectives of the recommending states as described by Madison, but which would respect other concerns of his peers. The language finally selected accomplishes these objectives in a skillful manner and becomes quite unambiguous in light of the concrete realities. The phrase "respecting an establishment" had two jobs to do, *i.e.* prevent Congress from establishing or favoring a national religion, and prevent Congress from interfering with state religious practices. It did both well, and only violence to its purpose can ensue if suggestions of basic ambiguity are

<sup>22</sup> See Corwin, *supra* note 9, at 10; Malbin, *supra* note 14, at 17; J. Story, *Commentaries on the Constitution of the United States* 731 (1833).

allowed to force other basic objectives upon the Establishment Clause.

The phrase "respecting an establishment" cannot reasonably be read to mean concerning or touching upon religion. Indeed, that was the terminology of Livermore's proposal which was eventually rejected. The word "establish," or its derivatives, was consistently used to refer to preferred religions in the amendments recommended by the states, by Madison in the House debate, and in versions of the measure in both House and Senate. There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to expand the meaning of "an establishment of religion" or the scope of the Clause. As noted, the use of "respecting" made clear that Congress was also prohibited from passing laws affecting state establishments.<sup>23</sup>

The language of the Clause does not concern itself with religion in general but with the particular problem of *an establishment of religion*. There was no concern expressed during the August 15 debate that Congress might enact a law beneficial to religion or religious institutions. Such benevolence was not perceived as an evil (discussed *infra* at 21-23). Had this been the concern it could have been dealt with simply by providing that "Congress shall make no law respecting religion" without introducing the more limited concept of "an establishment of religion."

It has been observed that if the authors of the Establishment Clause intended only the objective of prohibiting preferred or established religion, they could have simply so provided rather than choose the language they did. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). However, as demonstrated, such terminology was rejected by the First Congress for the reasons discussed *supra* at 14.

## 6. Establishment And Religious Liberty

The Establishment Clause is part of the Bill of Rights. The canon *ejusdem generis* suggests, and the history of the Religion

<sup>23</sup> Malbin, *supra* note 14, at 16.



Clauses requires, that the Establishment Clause be viewed as a means for protecting individual liberty. See Madison's explanation of intent, *supra* at 10. Especially is this so under the Fourteenth Amendment which applies the Establishment Clause to the states. That Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious freedom.

The Establishment Clause has a functional relationship to religious liberty. As the Court has noted, it reflects the experience of its framers that officially preferred or established religion generates religious intolerance and persecution. *School District of Abington Township v. Schempp*, 374 U.S. 203, 221-22 (1963); *Engel v. Vitale*, 370 U.S. 421, 430-32 (1962); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). Both components of the Religion Clauses were meant to work to the same end. If the Establishment component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities of religious institutions which serve the public interest and which pose no threat to religious freedom.

**C. Properly Applied, The Three-Part Test Will Subvert Only Those Public Acts Which Pose A Genuine And Concrete Threat To Authentic Establishment Clause Values.**

No rule has been framed delineating the precise limits of the reach of the Establishment Clause. *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361 (1984). It is not the purpose of this *amicus* to suggest one. Flexibility is necessary to identify concrete threats to Establishment Clause values in modern society. Cf. *Committee For Public Education, Etc. v. Regan*, 444 U.S. 646, 662 (1980). This *amicus* does urge the Court, however,

1. to give great weight to the important public interest served by the government action which is said to offend the Establishment Clause [*Secular Purpose Test*], and

2. to require a *showing* of a concrete threat to authentic Establishment Clause values which obliges the Court to subvert the exercise of constitutional authority by state and local governments [*Primary Effect and Excessive Entanglement Tests*].

This *amicus* respectfully submits that more vigorous demands upon challenges to otherwise legitimate and necessary public acts will accord with the wisdom of Chief Justice John Marshall and, in the end, best serves society's interest in meeting its needs while avoiding real establishment concerns.

**1. Secular Purpose—An Important Factor In Establishment Clause Analysis Which Gives Due Recognition To Government's Exercise Of Constitutional Authority.**

Pursuing its responsibility and broad interest in education, a city or state will often provide educational services to all children, regardless of where they attend school. That the provision of such services has a valid secular purpose is well recognized. See *Board of Education v. Allen*, 392 U.S. 236 (1968); *Wolman v. Walter*, 433 U.S. 229 (1977). The application of the "three-part" test has placed too little emphasis on its secular purpose prong. Save in rare instances,<sup>24</sup> the decisions seem routinely to acknowledge a secular purpose exists, preoccupied by the difficult considerations inherent in the "primary effect" and "excessive entanglement" questions.<sup>25</sup> As Chief Justice Marshall suggested, the requisite constitutional analysis requires a balancing of the state's interest and constitutional authority, and authentic Establishment Clause values.

Education is perhaps the most important function of state and local governments. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); see *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). An educated citizenry "is essential to the political and economic health of any community." *Mueller v. Allen*, 103 S.Ct. 3062, 3067

<sup>24</sup> See *Stone v. Graham*, *per curiam*, 449 U.S. 39 (1980) (purpose for posting Ten Commandments in public school classrooms was religious).

<sup>25</sup> See *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 754 (1976).

(1983). The existence of free public schools in every state attests to the importance of education. In creating the U.S. Department of Education, the Congress found that "education is fundamental to the development of individual citizens and the Nation,"<sup>26</sup> and that "in our federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems."<sup>27</sup> The Court has recognized "the vital role of education in a free society." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 31 (1973).

It is also clear that governmental interest in education extends to all children, regardless of where they attend school. Over fifty years ago this Court recognized the "power of the state to compel attendance at some school and to make reasonable regulations for all schools." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). In upholding the state loan of textbooks to children attending private schools, the Court noted that the expenditure of funds for such books was for a public purpose and that the state's "interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded." *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 375 (1930). A state has "a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them." *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, etc.).

For all practical purposes, the private schools (church-related or not) in our nation are an important part of the total educational apparatus which serves the public interest. Indeed, the diversity they bring is itself an important element in the national educational enterprise. Who can rightly deny that when government augments the private endeavor, it serves the public interest and itself by improving the quality of education at the lowest public

<sup>26</sup> Department of Education Organization Act § 101(1), 20 U.S.C. § 3401(1) (1982).

<sup>27</sup> Department of Education Organization Act § 101(4), 20 U.S.C. § 3401(4) (1982).

expense? When government's self-interest moves it to cooperate with private schools in their educational partnership, through means which have no objectionable religious content, only the most superficial or hostile view of the facts will perceive offense to authentic constitutional values. Of course, one may speculate about possibilities of constitutional abuse where there is none in fact, but that is precisely the target of Chief Justice Marshall's admonition. Speculation should not be allowed to transform a public endeavor into objectionable religious sponsorship through an attenuated notion of Establishment Clause values.

## 2. "Primary Effect" and "Excessive Entanglement"—Identifying Demonstrated and Concrete Threats To Establishment Clause Principles.

State and local governments should not be prevented from pursuing their legitimate secular purposes except where a demonstrated and concrete threat to authentic constitutional values exists. The validity of "primary effect" and "excessive entanglement" tests lies in their service to those values.

### a. "Primary Effect"—A Term Of Uncertain Application.

The general principle of the cases is that a legislative enactment does not contravene the Establishment Clause if its "primary effect" neither advances nor inhibits religion. *Committee For Public Ed., Etc. v. Regan*, 444 U.S. 646, 653 (1980). Properly so, the Court's concern is with those governmental actions which pose a real danger of establishing religion in the historical sense. See *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361 (1984). "[W]e are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights . . . The risk of significant religious or denominational control over our democratic processes . . . is remote . . . and such risk is entirely tolerable in light of the continuing oversight of this Court." *Mueller v. Allen*, 103 S. Ct. 3062, 3069 (citation omitted) (1983). Thus, the proper job of the "primary effect" test in Establishment Clause analysis is to identify those governmental actions which pose a realistic threat of governmentally established religion.



In practice, the "primary effect" test has resulted in the invalidation of some programs involving no concrete threat of establishing religion within the meaning of the Establishment Clause. For example, programs have been invalidated which provided payments for certain state-mandated services [*Levitt v. Committee For Public Education And Religious Liberty*, 413 U.S. 472 (1973)], loans of secular instructional materials and equipment (e.g., maps, charts, and laboratory equipment) [*Meek v. Pittenger*, 421 U.S. 349, 365 (1975)], and field trip transportation to government and cultural centers [*Wolman v. Walter*, 433 U.S. 229, 254 (1977)]. All were thought to have the impermissible primary effect of advancing religion, although there was no showing that any of the benefits were used for religious purposes.

The elusive meaning of "primary effect" not only leads to the unnecessary invalidation of important educational programs, but it has led to conflicting results<sup>28</sup> which greatly complicate the jobs of legislators and administrators.<sup>29</sup> There are a few difficulties with the term "primary effect." One is the degree of subjectivism which it allows when it is not rooted firmly in authentic constitutional values, and a requirement of a demonstrated, concrete threat to those values. A second, which is related to the first, lies in the usage of words. Does primary mean "principal," or "most important?" Does it also connote purpose? There is some of each in the cases. The *Nyquist* case exemplifies the latter, although the "secular purpose" prong seems the appropriate analytical niche to judge purpose.

The essential problem stems from Justice Black's broad assertions concerning "aid to religion" and "separation" which dominate the Establishment Clause analysis in the seminal case of

<sup>28</sup> Cf. *Committee For Public Ed. And Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973), with *Mueller v. Allen*, 103 S. Ct. 3071 (1983) (both cases involved unrestricted tax benefits for parents of children attending church-related schools); cf. *Meek v. Pittenger*, 421 U.S. 349, 365-67 (1975), with *Committee For Public Ed., Etc. v. Regan*, 444 U.S. 646, 657 (1980) (both cases involved direct secular aid to church-related schools).

<sup>29</sup> See Wilson, *The School Aid Decisions: A Chronicle of Dashed Expectations*, 3 Journal of Law and Education 101 (1974).

*Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), and which became entrenched a year later in *McCullum v. Board of Education*, 333 U.S. 203, 210-11 (1948). The importance of the generative history of the Establishment Clause was lost by its omission from the briefs filed in *Everson*, and the lack of discussion in the *McCullum* majority opinion (Black, J.) although the history was fully briefed by the appellees. When that history was discussed fourteen years later in *McGowan v. Maryland*, 366 U.S. 420, 440-42 (1961), its significance had become severely blunted. To the authentic objectives of the Establishment Clause, the *Everson* opinion established the roots of another couched in terms of aid to religion. The abiding effect was an anguished tension between the common sense and tradition of "benevolent neutrality" toward religion, and the frustration of the will of the people more than authentic Establishment Clause objectives could reasonably require.

Such results proceed, in part, from undue emphasis upon the participation of religious groups in public educational programs. That focus can distort the analysis and lead to inevitable invalidation under the Establishment Clause. See *Lynch v. Donnelly*, 104 S. Ct. 1355, 1362 (1984). Evaluation of the effect of a challenged program should focus on the government's role in the program because governmental establishment of religion is the object of the strictures of the Establishment Clause. The Court has recently emphasized the importance of interpreting the Establishment Clause in accordance with "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 104 S. Ct. 1355, 1359 (1984); see also, *Mueller v. Allen*, 103 S. Ct. 3062, 3069 (1983); *Marsh v. Chambers*, 103 S. Ct. 3330, 3334 (1983). Assuredly, this will provide the stability and principled content which Establishment Clause law requires.

To assess accurately the "contemporaneous understanding" of the Establishment Clause, it is as necessary to reflect the framers' accommodation of religious groups as it is to honor their concerns. Accommodation between government and religion is not only permitted but, in some circumstances, is required by the Constitution. See *Zorach v. Clausen*, 343 U.S. 306, 314 (1952);



*Lynch v. Donnelly*, 104 S. Ct. 1355, 1359 (1984). The Establishment Clause was not intended to limit governmental action not involving actual or threatened governmental establishment of religion. This is illustrated vividly by contemporaneous actions of the First Congress.<sup>30</sup> Congress authorized the appointment of paid chaplains just three days before final agreement was reached on the language of the Bill of Rights. *Marsh v. Chambers*, 103 S. Ct. 3330, 3333 (1983). On the same day, the House passed a resolution requesting the President to set aside a Thanksgiving Day to acknowledge "the many signal favors of Almighty God." *Id.* at 3334, n.9. On August 7, 1789 Congress re-enacted the Northwest Ordinance which in Article III, provided in part: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."<sup>31</sup>

Other early actions of the federal government illustrate the compatibility of the principle of accommodation with authentic Establishment Clause values. On three occasions Thomas Jefferson extended a 1796 act which had authorized the issuance of patents, without payment, for three tracts of land to the Society of the United Brethren for propagating the Gospel among the Heathen.<sup>32</sup> Jefferson also recommended that the various religious sects be allowed to establish schools of theology on the confines of Virginia's public university. See *McCullum v. Board of Education*, 333 U.S. 203, 245-6 (1948) (Reed, J., dissenting). From the beginning of the republic until 1895 it was the practice and policy of the federal government to encourage the education of Indians through the work of religious organizations. Funds to support schools operated by various denominations were appropriated both from general appropriations acts and treaty obligations. See *Quick Bear v. Leupp*, 210 U.S. 50 (1908).

<sup>30</sup> Acts of the First Congress are contemporaneous and weighty evidence of the true meaning of the Constitution. *Marsh v. Chambers*, 103 S. Ct. 3330, 3334 (1983).

<sup>31</sup> Ch. VIII, 1789 Stat. 50, 53; C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment* 126 (1963).

<sup>32</sup> R. Cord, *Separation of Church and State: Historical Fact and Current Fiction*, 41-46 (1982.)

The Establishment Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious freedom. Recognizing this, the Court has consistently rejected the proposition that any program which aids a religiously affiliated institution in some manner violates the Establishment Clause. *Mueller v. Allen*, 103 S. Ct. 3062, 3065 (1983). This has been true even where the aid has been substantial. See *Walz v. Tax Commission*, 397 U.S. 664 (1970) (property tax exemption for churches); *Committee For Public Ed., Etc. v. Regan*, 444 U.S. 646 (1980) (direct payments to church-related schools for certain state mandated services).

Fairly judged, a bona fide public act or program intended to promote the education of youth will necessarily have a truly primary ("principal," "most important") effect in accord with its purpose, and will not offend authentic Establishment Clause values except in rare cases involving impermissible ulterior motives or extraordinary collateral effects.

#### b. Role Of Excessive Entanglement In Establishment Clause Analysis.

Excessive government entanglement with religion was added as the third distinct prong of the three-part test in *Lemon v. Kurtzman*, 403 U.S. at 612-13. The roots of excessive entanglement as part of Establishment Clause analysis are found in *Walz v. Tax Commission* where the Court stated: "[W]e must also be sure that the end result [of property tax exemptions for churches]—the effect—is not an excessive government entanglement with religion." 397 U.S. at 674 (emphasis added). The application of the excessive entanglement test involves consideration of the same factors that are examined under the "primary effect" test. See *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 755-63 (1976). Justice White observed in *Roemer* that there is "no reason to indulge in the redundant exercise of evaluating the same facts and findings under a different label." 426 U.S. at 769 (White, J., concurring in judgment). This proceeds from the fact that the test is a product of a concern over the "effect" of challenged programs.

In *Meek v. Pittenger*, remedial secular instruction provided to children in nonpublic schools (the majority of which were church-related) was invalidated under the excessive entanglement test. 421 U.S. 349, 370 (1975). In *Wolman v. Walter*, that test was failed by the provision of transportation to nonpublic school students for field trips to "governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students." 433 U.S. 229, 253-55 (1977). In neither *Wolman* nor *Meek* was there any actual, governmental surveillance of any religious activity. Rather, it was the perceived need to require comprehensive surveillance to insure secularity in the challenged programs that led to their downfall under the excessive entanglement test. *Wolman v. Walter*, 433 U.S. at 254; *Meek v. Pittenger*, 421 U.S. at 370. Chief Justice Burger succinctly described this perception in *Meek*:

"There is absolutely no support in this record or, for that matter, in ordinary human experience for the concern some see with respect to the "dangers" lurking in extending common, nonsectarian tools of the educational process—especially remedial tools—to students in private schools."

421 U.S. at 385 (Burger, C. J., dissenting in part). More recently, however, the Court has avoided the complications arising from a judicial insistence on a surveillance mechanism. *Committee For Public Ed., Etc. v. Regan*, 444 U.S. 646, 661-62 (1980).

The results in the cited cases exemplify the mischief caused when conjecture and unsupported fears creep into the constitutional analysis, contrary to Chief Justice Marshall's admonition in *Fletcher v. Peck*, *supra*. The excessive entanglement test should be concerned only with government's *actual* involvement, and the necessary implications of that involvement. The ultimate concern of excessive entanglement is with "the resulting relationship between the government and the religious authority." *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). Entanglement is excessive when the government engages in "comprehensive, discriminating, and continuing state surveillance" of activities within religious institutions. *Mueller v. Allen*, 103 S. Ct. 3062, 3072 (1983).

Extensive government monitoring and surveillance of religious institutions could result in governmental direction of, or control over, purely religious matters. Governmental direction of religious activities would raise obvious Free Exercise and Establishment Clause concerns, the former if it interfered with the practice of religious beliefs, and the latter because significant government involvement tantamount to control could lead to an established religion. Properly applied, therefore, the excessive entanglement test can serve legitimate Establishment Clause values. However, it should not be the gratuitous foe of educational programs which are untainted in fact by constitutional excess.

## II

### THE GRAND RAPIDS PROGRAMS POSE NO REAL THREAT TO AUTHENTIC ESTABLISHMENT CLAUSE VALUES. THEY SATISFY THE COURT'S THREE-PART TEST, PROPERLY ROOTED IN THOSE VALUES.

The Court of Appeals held unconstitutional the Shared Time and Community Education classes ("Program") offered by the School District of the City of Grand Rapids ("School District") to nonpublic school students in classrooms leased from church-related schools *Americans United For Separation Of Church And State v. School District, Etc.*, 718 F.2d 1389 (6th Cir. 1983). The Program poses no real threat as a government establishment of religion and satisfies the three-part *Lemon* test used by the Court in school aid cases. The Court of Appeals erred in holding that the Program violated the Establishment Clause of the First Amendment.

In carrying out its public responsibility for providing quality education to all children in the community, the School District offered certain secular courses<sup>33</sup> to children attending nonpublic, church-related schools. The courses are taught by public school employees<sup>34</sup> in classrooms leased from the nonpublic schools

<sup>33</sup> Classes offered under the Program included instruction in math, reading, art, music, physical education, and arts and crafts. 718 F.2d 1389, 1392 (1983).

<sup>34</sup> Although some of the teachers in the Program also teach at nonpublic schools, they are, nonetheless, employees of the School District subject to supervision of public school officials in the Program. 718 F.2d at 1402.



which are affiliated with several different religious denominations. The record demonstrates that in the Program's six years of operation, no teacher in any class in the Program attempted to indoctrinate any student in religion. 718 F.2d at 1404. The secular courses offered in the Program are similar to those already being offered in the public schools of the School District.

The provision of secular courses under the Program threatens no authentic Establishment Clause value. By making the courses available at schools of various denominations, the Program is free from the kind of official denominational favoritism that the Establishment Clause was primarily intended to prevent. *See Larson v. Valente*, 456 U.S. 228, 244 (1982). The total absence of religious instruction from any of the offered classes eliminates any cognizable risk of government involvement in teaching the religious values or dogma of a particular religion. No government imprimatur of approval of religion is involved in the Program [*see Mueller v. Allen*, 103 S. Ct. 3062, 3068 (1983); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)], nor is the religious freedom of any individual or institution endangered in any way. For the reasons that follow, the Program is well within the requirements of the "three-part" test, properly rooted in authentic constitutional values.

#### Secular purpose.

There can be no question that the Program has a valid secular purpose. The court below so found. 718 F.2d at 1398. The School District has a strong interest in providing quality educational services to children within its jurisdiction. Providing services to children attending church-related schools in the community is simply a part of the broader, overall educational responsibility the School District has undertaken in the public interest (discussed *supra* at 17-19).

#### Primary effect.

Whether viewed separately or in the larger context of the totality of educational programs offered by the School District, the Program's primary effect neither advances nor inhibits religion. In its actual operation there is no indication that the Pro-

gram did anything but accomplish the School District's important objective of providing classes in secular courses. Providing the classes at the schools regularly attended by the children is entirely consistent with the Constitution which "affirmatively mandates accommodation . . . of all religions."<sup>35</sup> *Lynch v. Donnelly*, 104 S. Ct. 1355, 1359 (1984). There is no evidence that religion or religious values ever entered into any of the classes taught under the Program. The total absence of religious content from the Program eliminates any cognizable risk that classes may be used to advance religion. In Chief Justice Marshall's words, "slight implication and vague conjecture" do not present a cognizable risk.

That church-related schools, and in some instances their teachers, may derive some benefit from the Program does not change this conclusion. *See Walz v. Tax Commission*, 397 U.S. 664 (1970); *Committee For Public Ed., Etc. v. Regan*, 444 U.S. 646 (1980). In *Regan*, which involved direct state payments to church-related schools, the Court held that where it could be shown with sufficient clarity that the payments served the state's legitimate secular ends without any appreciable risk of being used to transmit or teach religious views, the payments did not have the primary effect of advancing religion. 444 U.S. at 663. The same result should obtain here.

#### Excessive entanglement.

The Program has operated without the kind of "comprehensive, discriminating, and continuing state surveillance necessary to run afoul" of the excessive entanglement prong of the three-part test. *Mueller v. Allen*, 103 S. Ct. 3062, 3071 (1983). In fidelity to the counsels of Chief Justice Marshall, the Court should not read into the Program "as an inevitability the bad faith upon which any future excessive entanglement would be predicated." *Committee For Public Ed., Etc. v. Regan*, 444 U.S. 646, 660-61

<sup>35</sup> The question of whether the challenged classes could have been provided elsewhere is not relevant here. The issue is whether the Program, as operated, violates the Establishment Clause. *See Lynch v. Donnelly*, 104 S. Ct. 1355, 1363 n.7 (1984).



(1980). If constitutionally offensive practices should occur in the future, they "can be dealt with 'while this Court sits.'" *Walz v. Tax Commission*, 397 U.S. 662, 678 (1970).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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**In The  
Supreme Court of the United States**

October Term, 1983

**THE SCHOOL DISTRICT OF  
THE CITY OF GRAND RAPIDS, et al.,**

*Petitioners,*

v.

**PHYLLIS BALL, et al.,**

*Respondents.*

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**BRIEF FOR THE NATIONAL JEWISH COMMISSION  
ON LAW AND PUBLIC AFFAIRS ("COLPA") AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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*On Writ of Certiorari to the  
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for the Sixth Circuit*

**BRIEF FOR THE NATIONAL JEWISH  
COMMISSION ON LAW AND PUBLIC  
AFFAIRS ("COLPA") AS AMICUS CURIAE  
IN SUPPORT OF PETITIONERS\***

\* This brief is being submitted by the National Jewish Commission on Law and Public Affairs ("COLPA") and is joined in by the following major national Orthodox Jewish rabbinic, synagogal, educational and social service agencies which represent the broad spectrum of the Orthodox Jewish community in this country:

Agudath Israel of America  
National Council of Young Israel  
Rabbinical Alliance of America  
Rabbinical Council of America  
Torah Umesorah, The National Society for Hebrew Day Schools  
Union of Orthodox Jewish Congregations of America  
Union of Orthodox Rabbis of the United States and Canada

(Footnote continued on next page)

## INTEREST OF THE AMICUS CURIAE AND SUMMARY OF ARGUMENT

The National Jewish Commission on Law and Public Affairs ("COLPA") is a voluntary non-profit membership organization of lawyers and social scientists that represents the Orthodox Jewish community on legal issues presented in judicial, legislative and administrative forums. Believing staunchly in the constitutional liberties guaranteed by the First Amendment to the United States Constitution, the Orthodox Jewish community endorses the principle that publicly controlled and operated educational programs that are totally secular in nature should be equally available to students attending religious schools as to those attending public schools. The record in this case establishes that the Grand Rapids School Board implemented the programs under attack in this litigation as a means of providing to private-school students (including those in parochial schools), in a convenient location, the same kinds of supplementary public education that had been made available with tax funds to public school students. The fact that these services are supplied at a site that is convenient to the students—i.e., in the same building where they receive their religious training and their required secular courses—should not invalidate programs which are otherwise operated and controlled by secular governmental officials and which have been shown, in actual operation over six years, to present no real threat of religious indoctrination.

According to the record made below, no students at Jewish religious schools are benefited by the pro-

In addition, this brief is joined in by the Board of Jewish Education of Greater New York, the educational service agency of the Federation of Jewish Philanthropies of New York.

grams at issue in this particular case. There appear to be no Jewish day schools in the City of Grand Rapids. Nonetheless, the issue of principle—i.e., whether supplementary publicly financed educational programs may be conducted under the control of public-school personnel on the premises of religious schools—is of great importance to the religiously observant Jewish community. If private-school students are denied the benefits of such programs, they are effectively excluded, because of their parents' religious beliefs, from educational benefits offered to the rest of the student population.

## ARGUMENT

This Court recognized recently in *Marsh v. Chambers*, 103 S. Ct. 3330, 3337 (1983), that in drawing constitutional lines between what is permissible and what is prohibited under the Religion Clause of the First Amendment it is essential "to distinguish between real threat and mere shadow." The decision of the court of appeals in this case elevates the shadow of speculative possibilities over the reality of actual experience. On the basis of an apparently inaccurate judicial assumption as to the identities of the teachers who are retained to teach shared-time classes (see Petition for Certiorari, pp. 6-7) and on the basis of sheer judicial speculation as to what such teachers are likely to do, the court of appeals has barred more than 11,000 children in Grand Rapids from receiving secular educational benefits that would enable them to be more useful and productive American citizens. It is undisputed that the evidentiary record of six years' experience with the Grand Rapids program has produced not a single instance of religious indoctrination during the Shared Time and Community Development prog-



rams conducted on premises leased from nonpublic schools (Pet. App. 35a). By disqualifying nonpublic school children from these programs simply because the classes are held in buildings which are also used for religious teaching, the court below crossed the line from neutrality which "neither advance[s] nor impede[s] religious activity" (*Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976)) to "hostility" against students whose parents have elected to provide them with a religious education at the elementary and secondary-school level (*Lynch v. Donnelly*, 52 U.S.L.W. 4317, 4318 (1984); *McDaniel v. Paty*, 435 U.S. 618, 636 (1978) (Brennan, J.)).

The unfairness of disqualifying students at religious schools from these programs becomes manifest if the nature and history of the programs is considered. The record establishes that well before 1976 the Grand Rapids public school authorities determined that the core curriculum at public schools should be supplemented with remedial and enrichment programs designed to help gifted, as well as disadvantaged, students. The State of Michigan offered significant financial inducements for initiation of such programs, presumably because the State and its citizenry are benefited if all schoolchildren receive a more rounded education than bare reading, writing, arithmetic, science and history.

All schools—public and private—continued after 1976 to provide the basic minimum requirements mandated by State law. Private schools were required to cover the costs of such a core curriculum entirely from their own resources. Beginning with 1976, however, the programs at issue in this case were conducted, *under the control and supervision of the public-school*

*authorities*, in rooms leased for public-school purposes from various private schools in Grand Rapids. The record further established that the Grand Rapids School Board arrived at the decision to utilize the private-school facilities for these enrichment programs not in order to further the religious goals of parochial schools but because the only alternative—utilizing public-school rooms and transporting the private-school students to the public schools for these sessions—would have been practically and financially impossible. Specifically, the Board concluded that:

- (1) the public school facilities had inadequate space for these programs;
- (2) the costs of transporting the private-school students to public school buildings would have been prohibitive; and
- (3) the disruption caused by transportation of the students would have harmed the educational effort.

In light of these findings, which were based entirely on permissible non-religious considerations, the only practical choices the Grand Rapids School Board had were either to rent private-school facilities or to exclude private-school children from these programs. The court of appeals has now ruled that the first alternative—the one the School Board chose—was constitutionally impermissible. The consequence is that the Constitution has been read to deny more than 11,000 children in Grand Rapids—and potentially hundreds of thousands across the country—the benefit of remedial and enrichment mathematics and reading courses, classes in art, music, and physical education, and after-school classes in arts and crafts, model-building and other leisure-time hobbies and activities. These are all classes that had not previously been offered in the non-public schools, are not required for promotion or



graduation, and have been made available for a number of years to children attending public schools in Grand Rapids.

We refuse to believe that the First Amendment to the United States Constitution, which was designed as a bulwark of religious liberty and a means of guaranteeing religious freedom in this Nation, prohibits public school authorities from utilizing the only effective means of delivering remedial and enrichment classes to the thousands of children who are receiving combined secular and religious educations because their parents have deep and abiding religious convictions. A Jewish parent who believes that it is an essential principle of his or her religious faith to teach the principles of Judaism diligently to his or her children (*Deuteronomy* VI, 7) is not only asked, under this constitutional doctrine, to pay for the child's religious instruction and for the core secular program that is required for promotion and graduation under State law, but is also asked to relinquish all practical access to supplemental programs that public-school authorities are prepared to provide, *under their exclusive guidance and control*, on the premises of a private school. The Constitution does not, we submit, require this "cruel choice." See *Braunfeld v. Brown*, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting); *see also* *Widmar v. Vincent*, 454 U.S. 263 (1981). The result of the ruling below is, at the least, the kind of "callous indifference" to religious believers which this Court has said "was never intended by the Establishment Clause." *Lynch v. Donnelly*, 52 U.S.L.W. 4317, 4318 (1984).

## CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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## QUESTION PRESENTED

The United States will address the following question:

Whether it constitutes a per se violation of the Establishment Clause for a local school district, as part of an enrichment and remedial educational program made available to all children in the district, to provide—under public school control—secular, supplementary, nonsubstitutionary courses of instruction to private school students on premises leased from religiously-oriented nonpublic schools.



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## In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-990

SCHOOL DISTRICT OF THE CITY OF  
GRAND RAPIDS, ET AL., PETITIONERS

v.

PHYLLIS BALL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS  
AMICUS CURIAE SUPPORTING PETITIONERS

## INTEREST OF THE UNITED STATES

This case involves the constitutionality of the "Community Education" and "Shared Time" programs of the School District of the City of Grand Rapids, Michigan, insofar as they provide educational services on the leased premises of nonpublic schools. The United States has a substantial interest in this matter because, since 1965, federal legislation has provided for grants-in-aid "to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means \* \* \* which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. (Supp. II 1978) 2701. See Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, 20 U.S.C. (Supp. II 1978) 2701 *et seq.*,



now superseded by 20 U.S.C. 3801 *et seq.*<sup>1</sup> The Act specifically requires that provisions be made for the participation of eligible students who attend nonpublic schools. 20 U.S.C. 3806. Many local educational agencies have met this requirement by providing Title I remedial education services to eligible children on the premises of nonpublic schools.

The practice of providing Title I educational services on the premises of nonpublic schools has been defended by the federal government in several cases. In *National Coalition for Public Education & Religious Liberty (PEARL) v. Harris*, 489 F. Supp. 1248 (S.D.N.Y.), appeal dismissed for want of jurisdiction, 449 U.S. 808 (1980), a three-judge district court upheld the practice on the basis of a thorough examination of the actual operations of the Title I program in New York City. Three other cases are pending at various stages in the federal courts. See *Felton v. Secretary, United States Department of Education*, Civil No. 78 CV 1750 (ERN) (E.D.N.Y. Oct. 4, 1983) (upholding constitutionality of the New York City Title I program), appeal pending, No. 83-6359 (2d Cir. filed Dec. 27, 1983); *Barnes v. Bell*,

<sup>1</sup> Effective July 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 464, codified at 20 U.S.C. 3801 *et seq.* Chapter 1's major objective is to continue to provide federal financial assistance to meet the special educational needs of the educationally deprived children served under Title I while, at the same time, eliminating burdensome and unnecessary federal supervision, direction, and control. See 20 U.S.C. 3801. Although Chapter 1 generally contains fewer and less restrictive program requirements than Title I, the provisions concerning the participation of children in private schools are virtually identical. Compare 20 U.S.C. (Supp. II 1978) 2740 (former Title I provision) with 20 U.S.C. 3806 (current Chapter 1 provision). Moreover, Chapter 1, at 20 U.S.C. 3803, expressly incorporates by reference several sections from Title I, as follows: 20 U.S.C. (Supp. II 1978) 2711-2713, 2721-2722, 2761-2763, 2771-2772, 2781-2783, 2791-2792, 2841-2844, 2853-2854. Accordingly, the government in this brief will continue to refer to this federal program by its familiar Title I name, but we will refer to the current Chapter 1 provisions where appropriate.

Civil No. C-80-0501-L(B) (W.D. Ky. filed Oct. 1, 1980); *Wamble v. Bell*, Civil No. 77-0254-CV-W-8 (W.D. Mo. filed Apr. 4, 1977).<sup>2</sup>

Although this case does not involve a challenge to educational services funded under Title I (Pet. App. 73a n.5),<sup>3</sup> this Court's decision is likely to have a substantial impact on the lower courts' consideration of the somewhat analogous legal and factual issues presented in the pending Title I cases. The United States therefore has compelling reasons for presenting its views on the constitutionality of the programs challenged here, and for informing the Court of the relevant elements of the Title I program.

### STATEMENT

1. The School District of the City of Grand Rapids, using state funds (Pet. App. 72a-73a), operates Shared Time and Community Education programs to provide schoolchildren a variety of courses that supplement the schools' core curriculum. These courses, with one exception not relevant here,<sup>4</sup> are not required for graduation or for progression from grade to grade (Pet. App. 7a, 8a-9a, 77a, 78a). As the courts below found, the challenged course offerings are strictly supplemental to the nonpublic schools' curriculum; none of the courses would

<sup>2</sup> In addition, the government, in its Brief for the United States as Amicus Curiae at 27-36, *Wheeler v. Barrera*, 417 U.S. 402 (1974), argued that the use of public school teachers to provide Title I remedial educational services to educationally deprived children on private school premises would not violate the Establishment Clause of the First Amendment.

<sup>3</sup> The parties entered a stipulation, approved by the district court, expressly providing that "the scope of the instant litigation does not include any claim by plaintiffs which challenges the constitutionality of the Title I Program of the Board of Education of the Grand Rapids Public Schools under the Elementary and Secondary Education Act of 1965" (J.A. 30-31).

<sup>4</sup> The exception was a Shared Time physical education course in secondary school (Pet. App. 7a, 77a). The district court's judgment against the continuation of that course was not appealed (J.A. 38-39).

otherwise be available at the nonpublic schools (Pet. App. 7a, 9a, 77a, 78a).

The Shared Time and Community Education programs are authorized, but not required, under state law (*Traverse City School District v. Attorney General*, 384 Mich. 390, 411 n.3, 185 N.W.2d 9, 17-18 n.3 (1971)), and are wholly funded by the State (Pet. App. 72a-73a). In the 1981-1982 school year, approximately 11,000 nonpublic school students participated in the Grand Rapids Shared Time and Community Education programs (Pet. App. 4a, 74a), which operated on a budget of approximately \$3 million (Pet. App. 74a n.6).

The Shared Time Program is designed to make available to nonpublic school students some of the courses that are available to public school students as part of the public schools' more varied general curriculum. Shared Time courses have been available in the State of Michigan since 1921. See *Traverse City School District v. Attorney General*, 384 Mich. 390, 407 n.2, 185 N.W.2d 9, 15 n.2 (1971); see also Pet. App. 6a, 76a. In the past, Shared Time classes had been offered only in public school buildings—off the premises of the private schools (Pet. App. 6a, 76a). Since 1976, however, the Grand Rapids Shared Time program has provided educational services on leased premises at both secular and religious private schools (Pet. App. 7a, 76a).

At the elementary school level, the Shared Time courses include remedial and enrichment mathematics, remedial and enrichment reading, art, music, and physical education (Pet. App. 7a, 76a). At the secondary school level, the courses include remedial mathematics (*ibid.*). These courses are taught by 131 public school teachers. Of these, 13 had been previously employed by nonpublic schools (J.A. 193). The Shared Time courses constitute "a relative small portion"—about 10%—of the average nonpublic school student's "total educational experience" (Pet. App. 8a, 77a).

The Community Education program in Grand Rapids began in the early 1970s and, since 1975, has included

offerings on leased premises at nonpublic schools (Pet. App. 8a, 77a). Courses in this program are offered only outside regular school hours (Pet. App. 8a, 77a). At the elementary school level, courses focus on leisure-time activities (Pet. App. 8a, 77a-78a), such as arts and crafts (J.A. 206-213). The courses are completely voluntary and are only offered when 12 or more students are enrolled (Pet. App. 9a). No Community Education courses at the secondary level remain at issue (J.A. 30-31).

More than 300 instructors are employed on a part-time basis by the public school district in connection with the Community Education program. Most of these are regular full-time instructors at the same school—public or nonpublic, as the case may be—where they teach Community Education courses. Pet. App. 9a, 78a. The district court and the court of appeals found that the reason for using teachers at the "home" school is that a "well known teacher able to attract students" is "essential" to inducing participation by sufficient students to justify the course offering (*id.* at 9a, 78a). For purposes of the Community Education program, however, these instructors are part-time *public* school teachers under exclusive public school supervision and control (Pet. App. 8a, 77a). The courts below found no evidence during the six years these programs have been conducted in their present form that "any teacher in either Shared Time or Community Development classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion" (*id.* at 35a).

The public school district pays a modest rental (\$6 per week per class at elementary schools, \$10 per week per class at secondary schools) for use of facilities on private school premises used for Shared Time and Community Education classes (Pet. App. 5a, 74a). Class areas used by the programs are designated by signs as public school classrooms, and contain no religious symbols or artifacts (*id.* at 5a, 75a).



2. Respondents, six state taxpayers residing within the Grand Rapids school district (Pet. App. 66a-67a), filed suit in the United States District Court for the Western District of Michigan against the school district and various state officials to challenge certain features of the Shared Time and Community Education programs as violating the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment (Pet. App. 66a). After a lengthy trial on the merits, which produced a voluminous factual record on the history and administration of the programs, the district court declared the challenged programs unconstitutional insofar as they involved "the use of premises leased from religious nonpublic schools" (Pet. App. 123a), and enjoined petitioners "from continuing to operate and conduct" those programs (*ibid.*). Petitioners were unable to obtain a stay of that judgment (Pet. 8), which was affirmed by a divided panel of the court of appeals (Pet. App. 1a-63a).<sup>5</sup>

### SUMMARY OF ARGUMENT

I. The Shared Time and Community Education programs operated by the School District of the City of Grand Rapids do not violate the Establishment Clause of the First Amendment. That these programs are in part operated in facilities leased from private schools (secular as well as religious) and thereby accommodate the educational needs and convenience of schoolchildren attending private schools does not detract from the challenged programs' secular purpose; nor does it transform the programs into a vehicle for advancing religion or give rise to excessive government entanglement with religion. The Grand Rapids programs therefore meet all the requirements of the three-part Establishment Clause test

<sup>5</sup> The Shared Time program has been upheld by Michigan state courts under both the Michigan and United States Constitutions. *Traverse City School District v. Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971); *Citizens to Advance Public Education v. State Superintendent of Public Instruction*, 65 Mich. App. 168, 237 N.W.2d 232 (1975), leave to appeal denied, 397 Mich. 854 (1976).

articulated by the Court in *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

A. It is well established that the states have a legitimate interest in helping to improve the secular education of students attending nonpublic schools. See, e.g., *Mueller v. Allen*, No. 82-195 (June 29, 1983), slip op. 6-7. There is no room for doubt that the supplemental educational programs at issue here were designed and implemented for purely secular purposes, as the district court and court of appeals below correctly held (Pet. App. 92a, 94a, 21a).

B. The primary effect of the Shared Time and Community Education programs is not to advance religion but to improve the secular education of Grand Rapids schoolchildren. The courses taught in these supplemental educational programs are made available by the school district to *all* schoolchildren, whether they are enrolled in private or in public schools, and without regard to whether a given private school is religious or secular. Any benefits that might flow to religiously-oriented schools are "indirect, remote and incidental" and, therefore, not prohibited by the Establishment Clause. *Lynch v. Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 13. Moreover, the record evidence—covering six years of actual operations of these on-premises programs—demonstrates that the school district has, in fact, been successful in providing secular supplemental instruction without in the least advancing the cause of religion. Although the beneficiaries of these programs include students who attend religiously affiliated schools, it is the schoolchildren—and not the private schools—who benefit.

C. The Shared Time and Community Education programs do not foster excessive government entanglement with religion. These programs are controlled and supervised entirely by the public school system. They are not seriously susceptible to diversion—and in fact have never in any way been diverted—to religious purposes. The programs occasion only minimal and routine administrative contacts between school district and religious



school authorities. Whatever potential dangers of administrative entanglement could be feared or imagined under these circumstances, the six-year factual record of actual program operations documented in this case shows that they have not materialized in Grand Rapids.

II. The federal Title I program shares many features of the Shared Time and Community Education programs, but it also has significant differences. Because no program funded under Title I is at issue in this case, there is no occasion here to defend its constitutionality. But the Court's decision in this case is, nevertheless, likely to affect the Title I cases pending in the lower federal courts. We therefore take this opportunity to provide a general description of the Title I program design for purposes of comparison with the two Grand Rapids programs challenged in this case.

#### ARGUMENT

##### I. THE USE OF PUBLIC SCHOOL TEACHERS TO PROVIDE SHARED TIME AND COMMUNITY EDUCATION SERVICES TO CHILDREN IN LEASED CLASSROOMS ON PRIVATE SCHOOL PREMISES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Federal, state, and local educational authorities unquestionably have a legitimate interest in providing to all schoolchildren, in nonpublic as well as public schools, a "fertile educational environment" (*Wolman v. Walter*, 433 U.S. 229, 236 (1977)) and an "ample opportunity to develop to the fullest their intellectual capacities" (*Meek v. Pittenger*, 421 U.S. 349, 352 n.2 (1975)). Accordingly, diverse programs such as Title I at the federal level, and Shared Time and Community Education at the state and local level in Michigan, have been established to provide secular remedial and enrichment courses, not otherwise available, to students attending both public and nonpublic schools, under conditions strictly controlled and supervised by public school authorities.

There are, undoubtedly, persons who view all private schooling as a threat to public education, and oppose, in principle, any services or assistance to private school chil-

dren that might indirectly make alternatives to public schools more affordable or attractive. As a matter of policy, to be decided by Congress, legislatures, and school boards, theirs is a legitimate position, at least insofar as it does not interfere with the constitutional rights of parents to choose private schooling for their children. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This Court has, however, consistently rejected attempts to use the Establishment Clause for the purpose of protecting public schools from private alternatives. *E.g.*, *Mueller v. Allen*, No. 82-195 (June 29, 1983); *Wolman v. Walter*, *supra*; *Meek v. Pittenger*, *supra*.

Merely because "children are helped" to attend nonpublic schools (*Everson v. Board of Education*, 330 U.S. 1, 17 (1947)), or because private religious schools may derive an "attenuated financial benefit" (*Mueller v. Allen*, slip op. 11), does not make a program of assistance to private school students, for that reason alone, constitutionally invalid. See *Lynch v. Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 13; *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). Indeed, the Religion Clauses of the First Amendment point in the opposite direction. This nation's "traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas" (*Lynch v. Donnelly*, slip op. 8), including education. See *Pierce v. Society of Sisters*, *supra*. The secular approach and atmosphere of the public schools (see, *e.g.*, *Stone v. Graham*, 449 U.S. 39 (1980)), is available to all; however, many parents and children prefer (and some feel impelled as a matter of religious conviction to seek out) schools where religious truths, as they understand them, are incorporated into the curriculum. This has been particularly true of adherents to faiths outside the mainstream of Protestant Christianity, for whom religious schools have been an important means of maintaining religious identity.

Thus, religious (as well as secular) alternatives to public education are tolerated—even welcomed—as part

of our pluralistic heritage. If the government then wishes to enrich and enhance the education available to all, the challenge is to find a means to do so without conferring a direct or substantial benefit on, or becoming excessively entangled with, religious institutions, in violation of the Establishment Clause. This requires a "practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman v. Walter*, 433 U.S. at 247 n.14.

This case provides an opportunity for this Court to assess the actual operations and effects of a program which is characteristic of many programs adopted across the country. In this case, unlike others that have reached this Court,<sup>6</sup> there is an extensive factual record documenting these operations and effects over a period of six years. The facts are "largely undisputed" (Pet. App. 4a, 73a). The Court is therefore in a position to conduct a "careful evaluation of the facts of the particular case" (*Wheeler v. Barrera*, 417 U.S. 402, 426 (1974)) and assess issues of purpose, effect, and entanglement, not in the abstract, but on the basis of a comprehensive record.

It is important to appreciate the practical problems associated with programs that seek to provide supplemental remedial and enrichment courses, not otherwise available, to children attending both public and nonpublic schools. For public school students, the logistics are straightforward: remedial courses are provided by specialists during the regular school day, and enrichment courses are offered on school grounds after regular hours. To reach private school students is more difficult. In this, the Michigan experience with Shared Time and Community Education parallels the frequent national experience with Title I. In both instances, the decision to provide services on private school premises has been made "only after experimenting with alternative programs," with "discouraging" results. *PEARL v. Harris*, 489 F. Supp. at 1255. See J.A. 325, 359-360 (comprehensive feasibility

<sup>6</sup> E.g., *Wolman v. Walter*, *supra*; *Meek v. Pittenger*, *supra*; *Wheeler v. Barrera*, 417 U.S. 402 (1974).

study). The success of the programs depends on the active participation—attendance and attentiveness—of the students. Many educators testified at trial—and there was no contrary evidence—that the most effective means of providing educational services to children is to do so at their regular school. The record in this case makes clear, and the courts below did not dispute, that the challenged programs are offered on the premises of the private schools specifically because on-site instruction is educationally superior—as well as less costly and easier to administer. J.A. 325.

We believe the courts below erred in concluding that the Shared Time and Community Education programs of the School District of the City of Grand Rapids were in violation of the Establishment Clause. In analyzing the challenged programs, we, like the courts below, will employ the familiar three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). That test was developed by this Court in the very context presented in this case: governmental aid to private (including religiously-oriented) schools or schoolchildren. Whatever questions might be raised about the suitability of that test when it is sought to be applied outside its original context (see *Lynch v. Donnelly*, slip op. 9; *Marsh v. Chambers*, No. 82-23 (July 5, 1983); *Larson v. Valente*, 456 U.S. 228 (1982)), the *Lemon* test, sensitively applied, would seem to furnish an appropriate "framework of analysis" (*Nyquist*, 413 U.S. at 761 n.5) for governmental programs of assistance to the education of children attending non-public schools.

#### A. The Secular Purpose Of The Grand Rapids Shared Time And Community Education Programs Is Not Disputed And Is Not At Issue

The district court found that "[t]he purpose[s] of the Shared Time and Community Education programs are manifestly secular" (Pet. App. 92a), and that the programs were "instigated \* \* \* for purely secular purposes"



(Pet. App. 94a). The court of appeals expressly affirmed that finding (Pet. App. 21a). Further review of that finding by this Court is therefore unnecessary. See *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); see generally *Mueller v. Allen*, slip op. 5-6.

**B. The Primary Effect Of The Grand Rapids Shared Time And Community Education Programs Is Neutral; The Programs Do Not Advance Religion**

This Court has repeatedly rejected interpretations of the Establishment Clause under which any law or program "that confers an 'indirect,' 'remote,' or 'incidental' benefit on [religion] is, for that reason alone, constitutionally invalid." *Lynch v. Donnelly*, slip op. 13 (brackets in original), quoting *Nyquist*, 413 U.S. at 771; see also *Widmar v. Vincent*, 454 U.S. 263, 273-274 (1981); *Walz v. Tax Commission*, 397 U.S. 664, 671-672, 674-675 (1970); *McGowan v. Maryland*, 366 U.S. 420, 450 (1961). The approach taken by this Court is reflected in the formulation of the "effects" prong of the three-part test: "The crucial question is not whether *some* benefit accrues to a religious institution as a consequence of the legislative program, but whether its *principal* or *primary* effect advances religion." *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (emphasis added).

**1. The Primary Effect Of The Programs Is To Enrich The Education Provided To Private School Students, Not To Advance Religion**

The record evidence covering a period of six years provides a firm basis for concluding that the primary effect of the Grand Rapids programs is to enrich the education provided to children at public and nonpublic schools, and not to advance religion. See J.A. 329-346, 346-353; cf. *PEARL v. Harris*, 489 F. Supp. at 1258-1265; see also Pet. App. 53a-54a (Krupansky, J., dissenting). The evidence gives no support to the conclusion that the challenged programs promote the sectarian activities of the private schools involved. On the contrary, the evidence establishes that the principal effect of the programs is,

as petitioners intended, to help the children themselves. The educational benefits to the children served by these programs are revealed clearly—even poignantly—in the district court testimony of educators and parents familiar with the programs. See, e.g., Record vol. VIII B, at 1392-1393. As the district court found, "both of these [challenged programs] do in fact have a positive impact on the participating nonpublic school students" (Pet. App. 95a).

The courses involved—remedial and enrichment mathematics, remedial and enrichment reading, art, music, physical education, and leisure-time activities such as arts and crafts (Pet. App. 7a, 8a, 76a, 77a-78a)—are themselves purely secular in character. The evidence shows further that the courses have not in any way been used to endorse or inculcate any religious teaching or belief. As the court of appeals acknowledged, "[t]here is no proof that any teacher in either Shared Time or Community Development classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion" (Pet. App. 35a). And there is no evidence that the programs have enabled the private schools involved to expand their enrollments<sup>7</sup> or to cut back on their own course offerings.<sup>8</sup> In short, the *primary* effect is to broaden the educational opportunities of schoolchildren, not to benefit religious institutions.

<sup>7</sup> The percentage of school age children attending nonpublic schools in the Grand Rapids area remained constant (within 1% of 30%) for the ten year period from 1971 to 1981. The institution of the on-premises Shared Time and Community Education programs in 1976 thus had no discernible effect on enrollments. J.A. 215-221, 355-357.

<sup>8</sup> The courts below acknowledged that none of the challenged courses would otherwise be available to private school students, and that the courses are not substitutes for private school offerings (Pet. App. 7a, 9a, 77a, 78a; see J.A. 109, 138, 146, 304, 347). Nor are the courses required for graduation (Pet. App. 7a, 8a-9a, 77a, 78a) or required by the State to be offered as part of the basic core curriculum (J.A. 361).



**2. The Programs Provide Comparable Educational Opportunities For All Schoolchildren, Public and Private, On A Neutral Basis**

If the "primary effect" analysis is not to be reduced to a definitional device for reaching a preordained conclusion, that analysis must be directed to the program as a whole. To "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, slip op. 10. See *Mueller v. Allen*, slip op. 8; *Widmar v. Vincent*, 454 U.S. at 274. A program that assists a broad class of beneficiaries without regard to religion does not violate the Establishment Clause merely because some—even many—of the beneficiaries happen to be religious. *Mueller v. Allen*, slip op. 8; *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976); *Nyquist*, 413 U.S. at 782 n.38; *Tilton v. Richardson*, 403 U.S. at 687.

The Grand Rapids programs at issue here are designed to benefit *all* schoolchildren, whether they are enrolled in public or private schools, and whether the private school is secular or religious. This fact is readily apparent with regard to the Community Education program because it is operated in the same fashion, under the same name, in both public and private schools throughout the school district (Pet. App. 8a-10a, 77a-79a).<sup>9</sup> Although the Shared Time program, as such, is operated *under that name* only on the leased premises of private schools, it is undisputed that the school district offers the same supplementary courses to public school students as part of the public schools' more varied general curriculum (Pet. App. 6a, 76a).<sup>10</sup> Thus, the courses offered under both of the chal-

<sup>9</sup> Indeed, another part of the Community Education program, not challenged here, provides enrichment courses for some 35,000 local residents in the evenings at various locations, including factories, senior citizen centers, hospitals, and public and nonpublic schools (J.A. 298). Thus, the benefits extend to a much broader segment of the community even than schoolchildren.

<sup>10</sup> Presumably, the school district could, if it chose, establish a single program—analogueous to the single Community Education pro-

lenged programs are made available to *all* students within the school district on an equal and equitable basis.<sup>11</sup>

**3. The Programs Provide Benefits Directly To The Eligible Schoolchildren**

This Court has found it "noteworthy that all but one of [its] recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves." *Mueller v. Allen*, slip op. 10.<sup>12</sup> Direct financial aid to parochial schools was cited in *Lemon v. Kurtzman*, 403 U.S. at 621, as a "factor [that] distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out

gram—that would cover the supplemental courses offered in nonpublic schools under the Shared Time program and in public schools as part of the more varied general curriculum. This hypothetical change in form would serve to highlight the fact that this educational program is offered to *all* students in the Grand Rapids school district—not just those who attend the private schools. See *Meek v. Pittenger*, 421 U.S. at 360 n.8 (Stewart, J.) ("So long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two.").

<sup>11</sup> We are at a loss to understand why the district court concluded that "[t]he challenged programs impact upon a very narrow religious class of beneficiaries" (Pet. App. 108a), that the program "directly benefits nonpublic school students \* \* \* while at the same time it excludes members of the public at large" (*ibid.*), and that "the beneficiaries are wholly designated on the basis of religion" (*id.* at 109a). As the "largely undisputed" facts (*id.* at 73a) clearly show, the programs are open to participation by all schoolchildren, totally without regard to religion, in both public and private schools. These inexplicable statements by the district court, which are contradicted by that court's own findings of fact, were not relied on by the court of appeals, though they were quoted (Pet. App. 23a-24a). In fact, the court of appeals agreed that the challenged programs provided supplies and services "to all schools, including parochial schools" (*id.* at 40a).

<sup>12</sup> The one exception is *Nyquist*, which involved a government aid program designed exclusively for the benefit of parents with children in nonpublic schools rather than a general program for the benefit of all schoolchildren.

that state aid was provided to the student and his parents—not to the church-related school.” See also *Walz v. Tax Commission*, 397 U.S. at 675 (noting difficulties presented by “direct money subsidy” program).<sup>13</sup>

The Grand Rapids programs provide no subsidy or other financial assistance to nonpublic schools.<sup>14</sup> The record demonstrates that effective measures have been taken to ensure that none of the secular services or materials provided to students in connection with these programs can be diverted to any use by the nonpublic schools (J.A. 329-330, 331-342). The record also shows that none of the courses offered through these supplemental programs relieve the private schools of any burdens or responsibilities previously undertaken by or required of them (Pet. App. 7a, 9a, 76a-77a, 78a; see note 8, *supra*).

The benefits that supposedly flow to religiously-oriented schools from these programs are a consequence simply of the fact that *students* at these schools—in common with all other students—have access to some educational programs that would otherwise be unavailable to them. It may be that these schools will, as a consequence, be re-

<sup>13</sup> Of course, the presence of even a direct governmental subsidy to a religiously-oriented school is not necessarily fatal to the constitutionality of a government aid program. See *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Roemer v. Board of Public Works*, *supra*; *Tilton v. Richardson*, *supra*. Cf. *Marsh v. Chambers*, *supra*, (upholding constitutionality of direct government payments to legislative chaplains); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding constitutionality of federal aid to hospitals operated by a religious order).

<sup>14</sup> The school district does, however, pay rent for use of leased facilities (Pet. App. 5a, 74a). The rent is paid for value received, and does not constitute a subsidy to the lessors (J.A. 324). See *Committee for Public Education v. Regan*, 444 U.S. at 657-659. Neither the district court nor the court of appeals relied on the rental payments as a basis for their findings of unconstitutionality. Cf. *State ex rel. School District of Hartington v. Nebraska State Board of Education*, 188 Neb. 1, 195 N.W.2d 161, cert. denied, 409 U.S. 921 (1972) (Title I leasing arrangement with Roman Catholic school held constitutionally permissible).

garded in a more favorable light by pupils and potential pupils and their parents.<sup>15</sup> But the same could, of course, be said of *any* form of aid to nonpublic school students. If this is an impermissible consequence, it is the inexorable conclusion that *all* such aid must be prohibited—a conclusion firmly rejected by this Court’s cases. See, *e.g.*, *Board of Education v. Allen*, 392 U.S. 236, 242 (1968); *Everson v. Board of Education*, 330 U.S. 1, 17 (1947). “The historic purposes of the [Establishment Clause] simply do not encompass th[is] sort of attenuated financial benefit.” *Mueller v. Allen*, slip op. 11.

#### 4. *The Decision Below Was Based On Speculation Not Supported By The Record*

The decision below appears to be based on preconceived notions about aid to parochial schools rather than any actual demonstration that the “primary effect” of the program is to advance religion. The court stated (Pet. App. 40a):

The Shared Time and Community Education programs at issue in this case clearly give direct aid to parochial schools in parochial school buildings. By so

<sup>15</sup> The court of appeals also suggested that a teacher’s “effective teaching in the Shared Time or Community Education class may so impress the student as to become a role model” (Pet. App. 42a)—thus having the effect of furthering that teacher’s religious ministry. But this argument surely proves too much. Any public school teacher—whether part-time or full-time—who is personally devout, and also an effective teacher, may become something of a role model for the children. Under the court of appeals’ reasoning, his very effectiveness as a teacher would be cause for constitutional concern, even though he may in no way have used his position to inculcate his religious beliefs.

In any event, the findings here demonstrate simply that “a well known teacher able to attract students is essential to the establishment of a successful Community Education program” (Pet. App. 9a, 78a). Thus, the primary effect of the arrangement is that the popularity of a private school teacher is exploited by Community Education to attract students to its programs. And none of this has any bearing on the Shared Time program, which uses full-time public school teachers.



doing, they also assist those schools in performing their religious missions, in violation of the First Amendment.

This simply mischaracterizes the case. The undisputed facts make clear that the programs provided no "direct aid to parochial schools" whatsoever. The programs have the purpose and effect of providing supplemental education to all students. And even the "indirect" benefit to the religious schools is exiguous: being strictly supplementary, the programs relieve the private schools of none of their own educational responsibilities or costs. And being substantially identical in public and private schools, the programs are unlikely to attract students to the private schools.

Without identifying any demonstrable—let alone "primary"—effect of promoting the "religious mission" of the private schools involved, the court of appeals speculated that the programs "are bound to have had [such] an effect" (Pet. App. 43a) because of their very existence as publicly-funded programs on the premises of religiously-oriented private schools. In effect, the court of appeals adopted the per se rule against on-premises educational services rejected by this Court in *Wheeler v. Barrera*, 417 U.S. at 426. And in the face of a "flawless record" of neutral administration (Pet. App. 56a-57a (Krupansky, J., dissenting)), merely speculative possibilities of impermissible effect do not provide an adequate basis for a finding of a constitutional violation. As this Court stated in *Tilton v. Richardson*, 403 U.S. at 679, although "[a] possibility always exists . . . that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement . . . judicial concern . . . cannot, standing alone, warrant striking down a statute as unconstitutional." See also *Marsh v. Chambers*, slip op. 11; *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 662, 656 (1980); *Wolman v. Walter*, 433 U.S. at 242.<sup>16</sup>

<sup>16</sup> The relevant portions of *Meek v. Pittenger*, *supra*, did not address the "effects" prong of the *Lemon* analysis, but focused in-

We suspect that the decision below was based more on the court of appeals' professed concern for "public education as a major aspect of the American goal of equality of opportunity" (Pet. App. 40a) than on the Constitution's prohibition of an established religion. The court of appeals was plainly moved by its fears that these programs might expand in the future. Finding state legislatures "in many states" to be "vulnerable to pressures from religious constituencies," the court of appeals speculated that "[u]nder such pressures legislatures can be expected" to adopt programs that would prove unconstitutional in effect (Pet. App. 40a). In substance, the court of appeals adopted the "no aid" interpretation of the Establishment Clause, despite its rejection by this Court, on the basis of a speculative distrust of legislatures. That is, of course, an entirely inappropriate basis for a federal court to invalidate a state program under the Constitution.

In fact, there is a deep inconsistency in the court of appeals' holding—that enriching the educational opportunities of private school students is a legitimate public purpose, but that, if successfully accomplished, the effect of so doing is unconstitutional. The "purpose" and "effect" inquiries, properly understood, are not so strangely inharmonious; they are the subjective and objective aspects of the same inquiry. *Lynch v. Donnelly*, slip op. 3-4 (O'Connor, J., concurring). Here the purpose of the program is legitimate, the means selected are suited to that purpose, and the consequence of the program is to secure that purpose. In order to find such a program repugnant to the Constitution, some unintended consequence must surely be specifically identified, one that is substantial enough so that it can fairly be said to outweigh the program's intended purposes and thus to constitute its "primary" effect. The court of appeals plainly has not identified anything of the sort. The "primary effect" of

stead on the entanglement question (see 421 U.S. at 369). The district court's reliance on *Meek* for its analysis of the challenged programs' primary effect (Pet. App. 99a-102a) is therefore misplaced.



providing Shared Time and Community Education courses on private school premises is that the intended beneficiaries of these programs can better take advantage of them. The programs are not, therefore, repugnant to the First Amendment.

**C. The Grand Rapids Shared Time And Community Education Programs Do Not Foster Excessive Government Entanglement With Religion**

**1. The Grand Rapids Programs Have Not Occasioned Excessive Administrative Entanglement With Religion**

Excessive administrative entanglement with religion is likely to occur in connection with a government program that requires "comprehensive, discriminating, and continuing state surveillance" over religious authorities. *Lemon v. Kurtzman*, 403 U.S. at 619. To determine whether such entanglement is involved, it is usually necessary to "examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority" (*id.* at 615).

In this case, we submit that the question of the "character and purposes of the institutions that are benefited" does not arise at all: the Grand Rapids programs benefit schoolchildren, not schools. Insofar as it can be said that there are incidental benefits conferred on participating schools, there is no dispute about their "character and purposes": both public and private schools participate; the latter include one purely secular private school and schools of five religious denominations. The programs are open to all.<sup>17</sup>

The "nature of the aid" provided here—providing certain supplemental educational programs—strongly militates against a finding of excessive church-state entangle-

<sup>17</sup> The Grand Rapids Baptist Academy, which operates four elementary schools and one high school, refuses to participate in the challenged programs because "it cannot live with the requisite loss of control" (J.A. 373).

ment. The courses themselves are strictly secular, and the school district has adopted, publicized, and enforced guidelines to preserve the independence of the programs from any influence or control by private school authorities. J.A. 184-185, 214, 329, 333, 335, 338, 344-345. Although within the premises of the nonpublic schools involved, the Shared Time and Community Education classrooms are leased by the public school district, are designated as public school classrooms, are exclusively under the control of the public school district, and are free of any religious symbols or artifacts. The Shared Time instructors testified, without exception, that they have never felt any religious pressure or influence exerted on them by the private school teachers or officials and that any religious "atmosphere" in the private schools has had "absolutely no impact or effect" on their teaching (J.A. 331).

The Shared Time instructors are full-time public school teachers, specialists in their field, who travel from school to school, both public and private. They are trained, supervised, and evaluated solely by public school authorities, without involvement by private school authorities (J.A. 328-340). The Community Education instructors are generally regular members of the faculty of the school, public or private, at which they teach, but, for purposes of Community Education, are hired, paid, assigned, supervised, and evaluated solely by the public school district (J.A. 350-352). The public school district exercises no authority over these teachers during the regular school day, and the private school exercises no authority over them during Community Education. The record provides no support for—and indeed affirmatively rebuts—the inference that, because of their regular employment by a religious institution, these teachers have required extensive monitoring or have allowed their courses (model building, rug hooking, arts and crafts, and the like) to lose their secular character.<sup>18</sup>

<sup>18</sup> Some teachers involved in the programs—perhaps especially those also employed by religiously-oriented schools—will presumably

Most importantly, "the resulting relationship between the government and the religious authority" in this case is not of the kind that has led or could be expected to lead to excessive administrative entanglement. This relationship takes the form of the routine and minor administrative contacts occasioned by disseminating information about the programs, processing requests for services, and resolving scheduling problems (Pet. App. 118a-119a). Such minimal contacts with the operation of the nonpublic schools scarcely reflect the degree of intrusiveness by governmental authorities that this Court has identified as amounting to impermissible entanglement. See *Mueller v. Allen*, slip op. 14; *Committee for Public Education v. Regan*, 444 U.S. at 660-661; *Walz v. Tax Commission*, 397 U.S. at 674-676.<sup>19</sup>

be personally devout. It cannot be presumed, however, that devout individuals are disabled from service as part-time (or full-time) public school teachers because of a supposed inability to comply with secular requirements. So long as a teacher is subject exclusively to public supervision and control in connection with his public duties, his religious affiliation or outside employment should not be deemed evidence of unfitness to teach secular subjects in a public school program. Cf. *McDaniel v. Paty*, 435 U.S. 618 (1978).

<sup>19</sup> *Meek v. Pittenger*, *supra*, does not govern this case. In *Meek*, a state program of aid to private schools was challenged on its face as soon as it was enacted, and was struck down by this Court because there were insufficient safeguards against the possibility of excessive entanglements. Here, by contrast, the challenged programs were carefully designed to avoid church-state contacts or friction, and the record demonstrates that the potential problems foreseen by this Court in *Meek* have not materialized. See *PEARL v. Harris*, 489 F. Supp. at 1265, 1267, 1269. On this record—entirely different from that in *Meek*—the court of appeals erred in treating *Meek* as a *per se* holding that "any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities"—an interpretation this Court rejected in *Committee for Public Education v. Regan*, 444 U.S. at 661. See also *Wolman v. Walter*, 433 U.S. at 247 (upholding a program where "the danger perceived in *Meek* [did] not arise"); *State ex rel. School District of Hartington v. Nebraska State Board of Education*, *supra*.

The only administrative entanglement specifically relied upon by the court of appeals was the need to monitor the activities of Shared Time and Community Education teachers to ensure that they do not promote the religious mission of the private schools involved (Pet. App. 43a). Even as to this, however, the basis for the court's concern was pure speculation—indeed, speculation of a particularly inappropriate sort. The court expressly acknowledged that the challenged programs have not in actual practice entailed "significant monitoring" (*ibid.*)—and that there nonetheless is no evidence that any teacher in the programs had sought to use the programs to promote his religion (*id.* at 35a). This finding that extensive monitoring has not been necessary to prevent abuses ordinarily would suffice to eliminate the "monitoring" problem from the case. But the court of appeals observed that the religious organizations currently involved in the program "have reputations for social responsibility" (*id.* at 43a), and warned that "[m]any less orthodox religious sects would be equally entitled to public funds<sup>20</sup> from those programs" (*ibid.*). The court predicted that "[m]any of them," as a result of their "religious zeal and economic need," might act less responsibly than the current participants (*ibid.*).

It should go without saying that invidious stereotypes about hypothetical "less orthodox religious sects" should play no part in constitutional adjudication. Cf. *Larson v. Valente*, 456 U.S. 228 (1982). In the absence of any actual findings of excessive entanglement, the Grand Rapids programs should have been upheld.

<sup>20</sup> We do not know what "public funds" the court of appeals was referring to. No public funds other than some rental payments go to religious institutions under the challenged programs. The rents themselves are not otherwise discussed by the court of appeals and do not appear to be a basis for its decision. See note 14, *supra*.



**2. The Court's Finding Of "Political Divisiveness" Is Neither Legally Nor Factually Supportable**

One of the major emphases of the court of appeals was on the supposed "political divisiveness" of the Shared Time and Community Education programs. See Pet. App. 43a-44a. The court's reasoning on this point should not be sustained.

The concept of "political divisiveness" derives from the observation in *Lemon v. Kurtzman*, 403 U.S. at 622, that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." But "this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct." *Lynch v. Donnelly*, slip op. 14. Although the existence of political divisiveness may suggest that the program at issue may be suspect under other parts of the Establishment Clause inquiry, it is not "an independent test of constitutionality." Slip op. 3 (O'Connor, J., concurring).

This is for sound reasons. As Justice O'Connor has pointed out, "[g]uessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise." *Lynch v. Donnelly*, slip op. 3 (concurring opinion). Moreover, it is awkward for the judiciary to inquire into, and perhaps discourage, the "uninhibited, robust, and wide-open" debate on public issues characteristic of our political system. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). It may also be difficult to know which side in a religiously-related dispute should prevail when a court determines that the political divisiveness of the controversy is too great to permit resolution by elected officials. In this case, for example, it may be thought more "divisive" to deny schoolchildren who attend religiously-affiliated schools access to supplementary educational services otherwise available than it would be to extend the services neutrally to all.<sup>21</sup>

<sup>21</sup> Ironically, the courts below cited as examples of "political divisiveness" the fact that the school board in millage elections and

In addition, the court of appeals failed to recognize that when a "case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, \* \* \* no inquiry into potential political divisiveness is even called for." *Lynch v. Donnelly*, slip op. 14 (citation omitted); see *Mueller v. Allen*, slip op. 15 n.11. Further, the six-year history of these programs in Grand Rapids has produced no evidence of significant political divisiveness (Pet. App. 56a).<sup>22</sup>

**II. THE VALIDITY OF THE FEDERAL TITLE I PROGRAM, WHICH IS A COMPREHENSIVE EDUCATIONAL ENRICHMENT PROGRAM FOR THE BENEFIT OF DISADVANTAGED PUBLIC AND PRIVATE SCHOOLCHILDREN, PRESENTS INDEPENDENT ISSUES THAT NEED NOT BE ADDRESSED IN THIS CASE**

This case does not itself involve any program funded under Title I (see note 3, *supra*). There is therefore no need to describe the nationwide Title I program in full detail or to engage in extended discussion of its constitutionality. Nevertheless, because the Court's decision in this case will unavoidably carry implications for judicial treatment of the pending Title I suits, we think it appropriate to provide a description of the general Title I

candidates in school board elections have been known to publicize the Shared Time and Community Education programs as a means of broadening the base of support for school taxes or for their candidacies (Pet. App. 26a-29a, 111a-114a). While the district court could be correct that "the spectre of Board candidates dividing voters over the [Shared Time and Community Education programs] haunts the political process" (*id.* at 114a), this phenomenon might as easily be interpreted as evidence that the challenged programs have wide popular appeal—that they *decrease*, rather than *increase*, political divisiveness over local educational issues. See J.A. 357-358.

<sup>22</sup> This litigation must surely not be allowed to serve as evidence of political strife. "A litigant cannot, by the very act of commencing a lawsuit, \* \* \* create the appearance of divisiveness and then exploit it as evidence of entanglement." *Lynch v. Donnelly*, slip op. 15.



program design for purposes of comparison with the two Grand Rapids programs challenged in this case. See also *Wheeler v. Barrera, supra* (containing some general description of Title I program); *PEARL v. Harris, supra* (describing New York City Title I program).<sup>23</sup>

A. Title I, along with other portions of the Elementary and Secondary Education Act of 1965, was designed to "bring better education to millions of disadvantaged youth who need it most." S. Rep. 146, 89th Cong., 1st Sess. 5 (1965) (citation omitted). See 20 U.S.C. (Supp. II 1978) 2701; 20 U.S.C. 3801 (declarations of congressional policy under former Title I and under Chapter 1 successor program). To carry out this congressional policy, Title I (now Chapter 1) provides for federal grants to state educational agencies (20 U.S.C. 3802), which, in turn, distribute funds to the eligible local educational agencies that have submitted appropriate applications for approval (20 U.S.C. 3805). A student's eligibility for participation in a Title I program is determined by reference to neutral criteria based on the concentration of poverty-level families in the student's particular area of residence and on the student's educational deficiencies. See 20 U.S.C. 3805(b). Title I funds may be used only to supplement, and in no case to supplant, nonfederal funds that otherwise would be expended for the participating children (20 U.S.C. 3807(b)). Educational services that may be made available under Title I include remedial reading, remedial mathematics, English as a second language, diagnostic testing, and clinical and guidance programs.

Congress made clear, in passing this legislation, that a student was not to be excluded from the benefits of Title I merely because of attendance at private, rather than public, school. See *Wheeler v. Barrera*, 417 U.S. at 406 (emphasis in original; footnote omitted) ("since the legislative aim [of Title I] was to provide needed assistance

<sup>23</sup> Both petitioners (Pet. 26) and respondents (Resp. Br. in Opp. 5-6) readily acknowledge that there are "important differences" (*id.* at 6) between Title I and the Grand Rapids programs.

to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act"). Congress thus specifically provided (20 U.S.C. 3806(a)):

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for special educational services and arrangements \* \* \* in which such children can participate \* \* \*. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

The particulars of the Title I program for eligible private school students were left by Congress to the local educational agencies, but it was clear that an equitable program involving proportionately equal expenditures is required (S. Rep. 146, *supra*, at 11-12).

With regard to the question of making public school teachers available in private school facilities, Congress indicated that such a program could be proper, but "only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school" (S. Rep. 146, *supra*, at 12). See also 111 Cong. Rec. 5747-5748 (1965) (remarks of Reps. Carey and Perkins, managers of the House bill).

Federal programs, such as Title I, differ in one fundamental respect from state aid programs for private school children. Unlike the states, the federal government does not operate a school system available to all school-age children. Therefore, in order to provide serv-

ices on a neutral and equitable basis for all schoolchildren, the federal government must include children attending private, as well as public, schools in programs such as Title I.

B. The Department of Education's regulations implementing the Title I program (now Chapter 1) are set forth in 34 C.F.R. Pt. 200. Several of these regulations specifically address participation in Title I programs by educationally deprived children in private schools. See 34 C.F.R. 200.70-200.85. The regulations require that local educational agencies (known as "LEAs") shall provide eligible private schoolchildren with Title I services that "assure participation on an equitable basis" (34 C.F.R. 200.70(a)(1)). The LEA must allow such children "to participate in a manner that is consistent with the[ir] number and special educational needs" (34 C.F.R. 200.70(b)). While so doing, however, the LEA must "exercise administrative direction and control over [Title I] funds and property" used in such programs (34 C.F.R. 200.70(c)). Moreover, the Title I services to private school children must be provided either by public employees or by contract with a person or organization "independent of the private school and of any religious organizations" (34 C.F.R. 200.70(d)(1)).<sup>24</sup>

Several regulatory provisions are specifically designed to effectuate the congressional intent that no financial aid or services be provided "to a private institution," as distinguished from the educationally deprived *schoolchildren* who attend a private institution. S. Rep. 146, *supra*, at 11. Thus, one provision stipulates that Title I funds may be used only "to provide services that supplement the level of services" that would otherwise be available to the eligible private school children (34 C.F.R. 200.72(a)).<sup>25</sup> Another provision specifies that Title I funds

<sup>24</sup> In this respect, the Title I program differs from the Grand Rapids Community Education program.

<sup>25</sup> In this respect, the Title I program is similar to the challenged programs here. See page 13 & note 8, 16, *supra*.

may be used only "to meet the special educational needs of children in private schools" and not to meet any "needs of the private schools" themselves or any "general needs" of the private school children (34 C.F.R. 200.72(b), (1) and (2)).

Although the LEAs are permitted to make public employees available on the premises of private schools, this approach may be used only as "necessary to provide equitable [Title I] services" and only "[i]f those services are not normally provided by the private school" (34 C.F.R. 200.73(a) and (b); cf. S. Rep. 146, *supra*, at 12). Moreover, "a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with [Title I] funds" (34 C.F.R. 200.74(a); cf. S. Rep. 146, *supra*, at 12).<sup>26</sup> Finally, the regulations expressly prohibit use of Title I funds "for repairs, minor remodeling, or construction of private school facilities" (34 C.F.R. 200.75; cf. S. Rep. 146, *supra*, at 11).<sup>27</sup>

C. As noted above, several cases challenging the Title I program are now pending in the lower courts. In our view, and in accord with *Wheeler v. Barrera*, *supra*, the decision in the present case should be limited to the facts and specific issues presented by the two Grand Rapids programs. Although a decision in favor of respondents would affect resolution of several of the legal issues that have arisen in connection with Title I, the lower courts in the Title I cases should not be foreclosed from addressing

<sup>26</sup> The challenged programs here have a similar policy. J.A. 341-342.

<sup>27</sup> According to the most recent data available in the record in *Felton v. Secretary, United States Department of Education*, *supra*, over \$3 billion (\$3,104,317,000) was appropriated for Title I program expenditures in Fiscal Year 1982. During the 1980-1981 school year, Title I services were provided to 5,170,935 public school children and 192,994 private school children. In other words, only about 3.7% of the Title I students attended private schools. And approximately \$105,200,000—about 4% of the total Fiscal Year 1980 appropriation—was expended on Title I services for children attending private schools.

the analogous but distinct factual and legal issues presented there.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1984



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CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE SCHOOL DISTRICT OF THE  
CITY OF GRAND RAPIDS, et al.,

Petitioners,

vs.

PHYLLIS BALL, et al.,

Respondents.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

BRIEF OF THE BAPTIST JOINT COMMITTEE  
ON PUBLIC AFFAIRS, THE NATIONAL COUNCIL  
OF THE CHURCHES OF CHRIST IN THE U.S.A.,  
AND THE AMERICAN JEWISH COMMITTEE AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS

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**QUESTION PRESENTED**

Did the court below err in its holding that the policy of sending public school teachers to teach secular subjects in nonpublic schools which are operated and controlled by religious organizations violates the establishment clause of the First Amendment?

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No. 83-990

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IN THE  
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October Term, 1983

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THE SCHOOL DISTRICT OF THE  
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Petitioners,

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ON WRIT OF CERTIORARI  
 TO THE UNITED STATES COURT OF APPEALS  
 FOR THE SIXTH CIRCUIT

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BRIEF OF THE BAPTIST JOINT COMMITTEE  
 ON PUBLIC AFFAIRS, THE NATIONAL COUNCIL  
 OF THE CHURCHES OF CHRIST IN THE U.S.A.,  
 AND THE AMERICAN JEWISH COMMITTEE AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS

---

Pursuant to Rule 36.2 of the Rules of  
 this Court, the organizations named above  
 file this brief in support of  
 Respondents. Consent for the filing of

this brief has been obtained in writing from the attorneys of record for the parties in this case. Their original letters have been filed with the Clerk of this Court.

#### INTEREST OF THE AMICI CURIAE

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional

Baptist concern for proper church-state relations. The Baptist Joint Committee has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle. We believe that the principle of religious liberty as it is embodied in the First Amendment to the Constitution of the United States is at risk in the case at bar.

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totaling approximately 43,000,000. It is governed by a General Board of 250 members chosen by the member denominations in proportion to their size



and support. The General Board determines the policies of the organization through debate, amendment and adoption of carefully-prepared statements and resolutions brought to it by its subordinate program divisions. Several of these policies affirm the principle of religious liberty, and it is on the basis of these policies that we enter this case.

Both the Baptist Joint Committee and the National Council of Churches played an active role in working out the compromises which made passage of the Elementary and Secondary Education Act of 1964 possible. Those compromises were designed to prevent government actions like those in Grand Rapids. Therefore, these amici are compelled by conscience to file this brief.

The American Jewish Committee, a national organization of approximately 50,000 members, was founded in 1906 to

protect the civil and religious rights of Jews. It is the conviction of this organization that the civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, we strongly support the constitutional principle of separation of religion and government. This principle has been the cornerstone of religious liberty in America and, historically, has proven to be of inestimable value to citizens of all faiths and of none. Accordingly, we believe that it is not a proper function of government to subsidize, whether directly or indirectly, any schools whose chief reason for being is to propagate a religious faith. This is why we join in the submission of this brief.

## CONSTITUTIONAL PROVISIONS INVOLVED

### U.S. Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the brief for Respondents filed with this Court. The issues of fact have generally been agreed to by the parties. Only the issue of the constitutionality of the policy of the Grand Rapids Public Schools (GRPS) of sending teachers hired by GRPS and paid with public funds into nonpublic schools which are overwhelmingly sectarian to teach secular subjects and the issue of standing need to be resolved.

Amici have competencies in First Amendment issues as they relate to religious liberty and the separation of church and state. While it is our firm belief that the courts below were correct in their determination that Respondents had demonstrated standing according to Flast v. Cohen, 392 U.S. 83 (1968), and Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), we do not assert special insights on this issue which would be of assistance to this Court. Hence, we will not advance arguments on the issue of standing.

### SUMMARY OF ARGUMENT

When the instant case was before the courts below, 546 F.Supp. 1071, 718 F.2d 1389, the issue of standing was settled quickly and the bulk of the courts'

analysis centered on the establishment clause tests developed by this Court and clearly stated in Lemon v. Kurtzman, 403 U.S. 602, 612, 613 (1971):

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." (citations omitted).

Amici argue herein simply that the policy adopted by GRPS to use public funds to pay salaries of teachers to teach secular subjects -- both "Shared Time" and "Community Education" courses -- in nonpublic schools which are almost exclusively religious in nature violates all three of the tests above and should be considered unconstitutional. Moreover, the child benefit theory is not applicable to this fact pattern.

## ARGUMENT

In recent years revisionist historians have sought to challenge this Court's interpretation of the establishment clause of the First Amendment. Generally, these historians have been guilty of using a limited data base to arrive at a preconceived notion of what they wish the founders meant by the establishment clause. They assume that those who wrote and implemented the First Amendment did not really mean what they said about the reasons for and the scope of the Amendment. Specifically, they assert that the establishment clause was intended to prevent the establishment of, or favoring of, one religious belief over all others. Sound scholarship is of a different opinion. As Prof. Levy has pointed out, when the First Amendment was written and adopted there was a plural



establishment of religion in the country; and the prohibition was against aid to or support of any religion, not just against establishment of a single church. See, Levy, "School Prayers and the Founding Fathers," Commentary, Sept. 1962.

Justice Douglas, in a concurring opinion in Lemon, supra, at 628, stated that the analysis of constitutional objections to the expenditure of public funds for parochial schools would have to take into account

the admitted and obvious fact that the raison d'etre of parochial schools is the propagation of a religious faith. They also teach secular subjects; but they came into existence in this country because Protestant groups were perverting the public schools by using them to propagate their faith. The Catholics naturally rebelled. If schools were to be used to propagate a particular creed or religion, then Catholic ideals should also be served. Hence the advent of parochial schools.

In large part as a result of the

decisions in Engel v. Vitale, 370 U.S. 421 (1962), and School District of Abington Township v. Schempp, 374 U.S. 203 (1963), an increasing number of Christian schools -- both church related and independent -- have been established to permit parents to choose an education for their children which involves oral group prayer, other religious exercises, and the teaching of as well as about religion.

The Orthodox Jewish community has traditionally provided a Hebrew Day School for its children. Other religious groups, e.g. the Black Muslims, have also begun to operate their own schools in order that their children may receive the kind of religious instruction the parents desire.

The basic purpose of denominational education is to foster and maintain the teachings of a denominational religion. The religious aspect of the curriculum must be

the principal and dominant reason for the existence of such schools. Essex v. Wolman, 342 F.Supp. 399, 419 (S.D. Ohio 1972), aff'd. 409 U.S. 808 (1972).

The point is that these schools have been established and operated -- usually on a financially sacrificial basis -- for religious reasons and for religious purposes. Any public programs which provide direct or indirect aid to religious schools, unless that aid is de minimis, must be given strict constitutional scrutiny.

1. The decision below correctly applies the primary effect and entanglement tests developed by this Court but inadequately deals with the secular purpose test.

This Court, in developing the three part establishment clause test -- secular purpose, principal or primary effect, and excessive entanglement -- has given the lower courts reliable guidance for deciding cases which deal with difficult and emotional controversies. In the instant

case, the lower court properly applied two of those tests to a fact pattern reflecting another attempt at public financing of selected programs in sectarian schools and arrived at the sound decision that the actions of GRPS were unconstitutional. Amici assert that the decision was constitutionally correct and could be faulted only in that it did not deal fully with the test for a secular purpose.

#### a. The Secular Purpose Test

Normally it is not easy to demonstrate that a legislative body which grants broad discretionary powers to develop educational programming for local school districts to local public school boards has anything but a secular purpose in so doing. However, when a local school district implements these broad discretionary powers by assigning teachers paid out of public funds to teach

classes in secular subjects in religious nonpublic schools, a secular purpose is difficult to discern.

We understand that, generally, legislative bodies -- whether Congress, a state legislature, or a school board -- make their own determinations on the constitutionality of their acts and that courts usually accept as a rebuttable presumption that they have acted with a secular purpose. However, in this case the presumption may be rebutted.

The law generally holds that when it is evident that specific results will flow from particular actions the person who undertakes those actions intends the results. A clear knowledge of the end result of an act makes the triggering action purposeful. Amici will discuss below the fact that the clearly foreseeable principal or primary effect of GRPS's action was the advancement of

religion. When that effect has been demonstrated, amici ask this Court to consider that the school board knew that the effect of its action in this case would be the advancement of religion and that, therefore, it had an unconstitutional purpose of advancing religion.

In their joint brief (PJB), Petitioners spend less than 13 lines, using argument by assertion, to conclude that "Clearly, the GRPS achieved its secular educational purposes." (PJB 23) Amici contend that the mere assertion that the GRPS exhibited "secular educational purposes" in their actions is not probative. Rather, amici contend that GRPS did not operate in a vacuum. Either it knew purposefully that public funds would be used to aid religious schools or it did not measure up to the duty of care required of directors of a multimillion dollar public operation. Simply, GRPS



acted to add faculty at public expense to religious nonpublic schools. The argument that they were public school teachers who remained public school teachers is without merit. Studies have shown that the type of relationship established by GRPS tends to convert public school teachers into parochial school teachers. La Noue, "Church-State Problems in New Jersey," 22 Rutgers L.Rev. 219 (Winter 1968). Amici believe that GRPS demonstrated the type of purpose forbidden by the establishment clause.

Whatever the motives of the GRPS might be, the purposes which it had in instituting the policy of spending public funds in parochial schools are invalid. "Good motives cannot save impermissible actions." Allen v. Morton, 495 F.2d 65, 72 (D.C.Cir. 1973).

#### b. The Primary Effect Test

The facts in this case reveal that

some 470 full-time and part-time teachers were employed to teach the Shared Time and Community Education courses in nonpublic schools in Grand Rapids. During the 1978-79 school year 9,494 nonpublic school children were enrolled in these courses and public funds totaling \$1,397,577.20 were spent to teach them. By the 1981-82 school year more than 11,000 nonpublic school children were enrolled and more than double the amount of public funds was expended -- approximately \$3,000,000. In addition to such core course supplements as physical education, industrial arts, music and art, courses such as remedial and enrichment mathematics and reading have been taught as part of the Shared Time program in nonpublic Grand Rapids schools. So too have highly desirable courses which enrich the college preparatory curriculum of the nonpublic school. Among Shared

Time courses offered were the following: Humanities, Language Arts, Home Economics, Science, Spanish, French, Latin, Business, Social Studies, Year-book, Calculus, Creative Writing, Psychology, Journalism, Criminology, and Advanced Biology. None of these courses except physical education was required for graduation from or promotion in any nonpublic school, but all of them are courses which secondary schools must offer if they are to provide their students with a curriculum which prepares them for college admission.

By relieving religious schools of the substantial cost of offering necessary courses -- optional to the students but not really optional to the schools -- the primary effect of the GRPS policy is to advance religion. The religious schools are financially freed to offer religiously impregnated core courses, to teach

religion, and to provide facilities for religious education and religious exercises. The nonpublic schools which have participated in the program financed by GRPS -- 28 Roman Catholic schools, 7 Christian schools, 3 Lutheran schools, 1 Seventh Day Adventist school, and 1 Baptist school -- have been directly aided thereby in both their secular and their sectarian educational efforts. It is not children who have been aided per se. Children have been aided only incidentally in the process of enlarging the resources available to religious schools and, thereby, advancing religion.

The Court of Appeals for the Sixth Circuit (at Joint Petition for Writ of Certiorari, 35a, 36a) stated the conclusions at which it arrived after a careful examination of the record and the findings of the District Court:

First, the schools with whom

the School Board of Grand Rapids has contracted and in which these classes are taught are religious institutions created, controlled and operated (as, of course, they have a clear right to be) with the advancement of their various religious faiths as a primary purpose.

Second, the majority of the controlling boards, administrators and teachers in the schools are adherents to the particular school's religious mission, as are the great majority of the parents of the students and the students themselves.

Third, the program has increased to the point where it involves 10% of the classroom time of the schools concerned and a total tax expenditure of \$6,000,000.

Fourth, a substantial number of the teachers employed in the Shared Time program were previously employed in the parochial school concerned, and a majority of teachers employed in the Community Education classes are teachers regularly employed in teaching in the religiously oriented program of the schools concerned.

Fifth, such supplementation of teachers' salaries is a direct benefit to all teachers in the two programs, and through them to the schools and to the religious mission of the schools concerned.

Sixth, the District Judge found, and we agree, that as to the three school systems concerned, "a substantial portion of the participating nonpublic schools' functions are subsumed in the religious mission..." Hunt v. McNair, 413 U.S. 734, 743 (1973).

Amici agree with these conclusions and emphasize the point that the action by GRPS "is a direct benefit to all teachers in the two programs, and through them to the schools and to the religious mission of the schools concerned." Because the GRPS has given direct and substantial public fund benefits to religious schools and their religious mission, that action patently transgresses the requirement that state action not advance religion.

### c. The Excessive Entanglement Test

The GRPS, in establishing Shared Time and Community Education programs which facially attempted to avoid an unconstitutional advancement of religion, estab-



lished programs which fail the excessive entanglement test. Petitioners point to the programs' six year record of operation which they claim shows that the programs existed without excessive entanglement. Amici assert that such a record could only result from one of two alternatives: (1) In order to know that there had been no excessive entanglement, a constant monitoring at an unconstitutional level was necessary to determine that the secular courses remained strictly secular, that the leased classrooms remained "desanctified," and that religious symbols -- including the wearing of school uniforms -- had not intruded to the degree that state approval or sponsorship of religion could be inferred by students, or (2) Monitoring was so nearly absent that there was a failure to determine properly that where public funds were spent religious and secular educa-

tion were kept scrupulously separated. Amici argue that not only the presence but also the absence of such monitoring creates constitutional problems for these programs.

In Lemon, supra, and DiCenso v. Robinson, 403 U.S. 602 (1971), cases dealing with aid to religious schools, it was held that the administrative rules established were such that the government was excessively entangled with religion. After that decision, Ohio's legislature passed a tuition reimbursement act under which a portion of tuition paid to religious schools was returned to parents who had children enrolled in those schools. No restrictions were set by the state to guarantee that the reimbursed tuition money would be spent for non-religious purposes. This lack of administrative control was held to be a defect by a three judge court in Essex,

supra at 416, which was affirmed by this Court:

[T]he State retains a responsibility of insuring that the public moneys thus provided and which retain their public character throughout the transaction, are used for constitutionally permissible ends and continue to be so used.

In the instant case, if the kind of arrangement which GRPS had with the religious nonpublic schools failed to incorporate sufficient administrative controls to insure that public moneys were used for strictly secular purposes, that arrangement is defective under the establishment clause. "[A]ny general purpose aid, lacking non-entangling restrictions on use, constitutes almost per se violation of the Establishment Clause." Id., at 414, 415 fn. 20.

Of further importance is the matter of which this Court spoke in Lemon, supra, at 622:

A broader base of entanglement

of yet a different character is presented by the devisive political potential of these state programs.

\* \* \* \* \*

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. (citations omitted)

The potential for divisiveness along religious lines is clear and present in the GRPS scheme in question in the case at bar. Approval by this Court of the GRPS scheme will mean that such programs will take on lives of their own and will generate political divisiveness along religious lines when further course offerings are sought and shares of a limited source of public funds are at issue between public schools and reli-

gious schools. Further, approval of this scheme would engender similar schemes all across the country. The ensuing controversies between the advocates of free, quality public education and those of nonpublic education which is permeated with religion would create divisiveness along religious lines the likes of which this country has not seen. The current anti-clericalism would be multiplied many fold.

Thus, it is amici's contention that the GRPS scheme, as measured by this Court's establishment tests, is constitutionally defective. Further, we contend that the fact pattern in this case makes it clearly distinguishable from Mueller v. Allen, 103 S.Ct. 3062 (1983). In Mueller the Court divided 5-4 in holding certain tax deductions for parents of all school children to be constitutional even

though a preponderance of the deductions went to parents of children in religious schools. The Court based its holding on the grounds that the tax deductions were generally beneficial to all parents and, more importantly, any aid went to parents of the children involved and not to the parochial schools themselves.

In the instant case, the aid went directly to the religious nonpublic school. This cannot be done without transgressing the strictures of the establishment clause. Further, it is not legally correct to argue that, because the Shared Time and Community Education courses were offered in both the public schools and the nonpublic religious schools, the benefits flowed to all children and, therefore, Mueller was controlling. In Mueller the tax deductions became available at the same time to all parents who qualified for those deduc-



tions. In the instant fact pattern, the courses in question had long been available in the public schools. The GRPS programs in question came into being in order to aid nonpublic religious schools. Because the GRPS scheme amounted to aid to schools, the unconstitutionality of that aid cannot be cured by drawing parallels between course offerings in public and nonpublic schools.

2. The decision below properly rejects the child benefit theory as it was applied to the fact pattern in the case at bar.

Petitioners' argument (PJB 30,31) that the GRPS's policy of paying for a part of the education of a child in a religious school is equivalent to the child benefit theory enunciated in Everson v. Board of Education, 330 U.S. 1 (1947), and Board of Education v. Allen, 392 U.S. 236 (1968) is specious. That is, as the Concise Oxford Dictionary

(7 ed. 1983) defines the word, it is "fair or right on the surface but not in reality."

Everson dealt with the permissibility of the state choosing to pay for transportation for children to attend church related schools. The emphasis was on the state's interest in protecting the safety, etc. of the children and the conclusion was that the aid went directly to the parents of the children who were the beneficiaries of the transportation. The aid did not go to the schools.

In Allen the Court held that the benefits of a state statute authorizing the purchase of textbooks which were then loaned to children in parochial schools inured to the children and their parents and not to the school.

As has been demonstrated and as the courts below held, the aid in question went directly to the religious schools in

the case at bar and the religious aims of those schools were advanced. Only as children were the recipients of the education available at the religious schools could an argument be made for a child benefit theory. In one sense, everything that happens in a school is a child benefit in that the children are the recipients of the offered education. However, such an interpretation of the child benefit theory makes it so broad it is meaningless and, if such an interpretation is allowed to be applied to religious schools, it makes the establishment clause a nullity.

Under the fact pattern of the instant case, children were obliged to go to a sectarian institution in order to obtain these public benefits. This made the sectarian institution the vehicle, conduit, channel, intermediary, and proprietor of public resources for the

benefit of those children, and of those only, who met its particular sectarian criteria for admission. In the process, these public resources became annexed to the parochial school, extending its institutional scope to the benefit of its religious sponsors. The children and their parents were aided only to the extent that nonpublic religious education became a bargain at public expense. This certainly cannot be admissible under this Court's explication of the establishment clause.

The child benefit theory may be described as good, desirable, and/or expedient in the abstract, but as this Court observed in Houchins v. KQED, Inc., 438 U.S. 1, 13 (1978), "We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment." To apply the child benefit theory to this

fact pattern runs contrary to the commands of the First Amendment.

### CONCLUSIONS

Amici cling to their traditional firm support of the constitutional requirement of the separation of church and state. We believe that both church and state flourish best when the two are separated. The financial support, promotion, and preferment, of religion, which are forbidden by the Constitution, are clearly at issue here. For these and the reasons argued above, amici pray that this Court sustain the decision of the Court of Appeals for the Sixth Circuit and use this opportunity to enunciate clear limits on the channeling of purported "child benefits" through sectarian educational institutions.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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ALEXANDER L. STEVAS,  
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In The  
**Supreme Court of the United States**  
October Term, 1983

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THE SCHOOL DISTRICT OF THE CITY OF GRAND  
RAPIDS; PHILLIP RUNKEL, Superintendent of Pub-  
lic Instruction of the State of Michigan; STATE  
BOARD OF EDUCATION OF THE STATE OF MICH-  
IGAN; LOREN E. MONROE, State Treasurer of the  
State of Michigan; IRMA GARCIA-AGUILAR and  
SIMON AGUILAR, BRUCE and LINDA BYLSMA,  
ROBERT and PENELOPE COMER, CLARENCE and  
ROSALEE COVERT, SCIPUO and JANICE FLOW-  
ERS, JOHN and SHIRLEY LEETSMA,

*Petitioners,*

v.

PHYLLIS BALL; KATHERINE PIEPER; GILBERT  
DAVIS; PATRICIA DAVIS; FREDERICK L.  
SCHWASS and WALTER BERGMAN,

*Respondents.*

— 0 —  
**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

— 0 —  
**BRIEF FOR RESPONDENTS**  
— 0 —

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Dated: June 8, 1984

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## STATEMENT OF THE CASE

The filing of this case August 7, 1980 in the Western District of Michigan followed a decision January 23, 1980 in that same District Court in *Americans United for Separation of Church and State v. Porter*, 485 F. Supp. 432. The issues of fact and law in that case, which involved a lease program in the Traverse City School District, were nearly identical to the instant case.

About 1975 Grand Rapids School District (hereinafter GRSD) initiated a program of providing various educational services to K-12 schools operated by various sectarian organizations and association. By 1978 these educational services had been extended to 40 sectarian schools. The number of nonpublic students had increased to 9,494, and the state school aid funds totalled \$1,397,577 (4a, J.A. 382). Courses offered by GRSD on the site of these various nonpublic schools included Reading, Math, Science, Art, Home Economics, Music, Physical Education, Humanities, and Foreign Language. These were offered in 28 different Roman Catholic school buildings, 7 Christian school buildings, 3 Lutheran school buildings, 1 Seventh-Day Adventist, and 1 Grand Rapids Baptist Academy school. 10a.

This program was further increased in 1979-80 to include 10,677 nonpublic students. Some of these sectarian schools receiving educational services from the Public School District are situated in close proximity to public schools offering the same classes, some even directly across the street. By 1981-82, the program had been extended outside the boundaries of GRSD, even into a neighboring county; (J.A. 456, parag 181) the number of participating nonpublic students was above 11,000; and state school aid approached \$6,000,000. 4a. The program operated on a budget of approximately \$3,000,000



leaving the remaining \$3,000,000 as "profit" for the school district. 74a.

The procedural device which provided the GRSD access to the sectarian school buildings was a formal lease. (J.A. 202). The unique functional concept of this lease is that it does not expressly pertain to any described wing, floor, or room in the parochial school but, rather, its impact accompanies the public school teacher into and about the building so that certain rooms are transformed into "public school" classrooms as and when the teacher convenes class there. As each room in this manner becomes a "public school", the students occupying the room become "public school students". (J.A. 381, 426, paragraphs 90, 91, 92). The School District requires its teachers to carry and to post signs which identify each such area as a public school classroom. (J.A. 427). Also, each such classroom is "desanctified" by removing crucifixes, religious symbols, and artifacts, although such objects are permitted to remain in adjoining corridors, surrounding rooms, or other facilities used in connection with the leasehold. (J.A. 428, 5a).

During the 1981-82 school year, rental payments in excess of \$200,000 were made by GRSD to the participating nonpublic schools, based on \$10 per class per week in high schools and \$6 per class per week in elementary schools. (116a, J.A. 426). Petitioners have incorrectly stated at Page 10 of their Brief that there were no payments of public funds to nonpublic schools.

These classes conducted by GRSD in leased classrooms in buildings owned and operated by sectarian school organizations are known as "Shared Time" and "Community Education" programs. The "Shared Time" classes are during regular school hours in courses such as

Reading, Math, Art, Music, and Physical Education, while "Community Education" classes in issue in the trial court were both before-school and after-school classes in a great variety of courses including Business, Typing, Astronomy, Industrial Arts, Photography, Psychology, Music, Sports, and Hobby & Crafts. 7a.

The Notice of Appeal from the District Court filed by Defendants August 18, 1982 states "no appeal is taken from such judgment on the merits to the extent it prohibits physical education and industrial arts shared time classes at the secondary level and community education classes at the secondary level". Thus, the case in the Court of Appeals and this Court involves only the following parts of the program at issue in the trial court:

1. Shared Time classes at the elementary level.
2. Community Education classes at the elementary level. These are "after-school" classes.
3. One Remedial Math Shared Time class at the secondary level.

Students attending Shared Time and Community Education courses in the leased facilities within nonpublic school buildings are enrolled for all other classes in that nonpublic school program. (J.A. 457, 431, 432). Thus, there is complete identity between students receiving Shared Time and Community Education instruction at any given nonpublic school and the students regularly attending that nonpublic school. 22a.

The total Shared Time and Community Education program in issue in the trial court involved 470 full and part-time teachers employed by GRSD. (J.A. 440). A significant portion of the Shared Time instructors previously taught in nonpublic schools, and most of those, upon becoming employed by GRSD, were assigned to the same nonpublic school building where they were pre-



viously employed. The Community Education offerings on facilities leased from a nonpublic school are taught by instructors employed full time by the very same nonpublic school. (J.A. 433-440).

The Michigan Legislature, under MSA 15.41282; MCLA 380.1282, has authorized local school districts to provide the programs here involved. (J.A. 152). That section provides:

"The board of a school district shall establish and carry on the grades, schools, and departments it deems necessary or desirable for the maintenance and improvement of the schools, determine the courses of study to be pursued, and cause the pupils attending school in the district to be taught in the schools or departments the board deems expedient."

Also, in the exercise of its general power to appropriate public funds, the Michigan legislature has authorized the payment of state school aid funds to local boards of education for part-time public school pupils receiving Shared Time instruction on leased premises. MSA 15.1919 (901) *et seq*; MCLA 388.1601 *et seq*. Also, MSA 15.4331; MCLA 380.331. (J.A. 153, 154).

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### SUMMARY OF ARGUMENT

This case involves the question of whether delivery of teacher services by a public school district to day schools owned and operated by churches and religious organizations, furnished pursuant to a lease of space in those school buildings and under circumstances of close cooperation between the parties to such lease, violates the Establishment Clause of Article I of the Bill of Rights of the United States Constitution.

Respondents proved by many exhibits and witnesses that the religious schools are closely affiliated with re-

ligious organizations, that their student bodies contain a high percentage of children professing those religions, that their avowed purpose and function is to integrate religious doctrine into all academic material presented in the schools, and that they succeed in this objective to the extent that a substantial portion of their functions are subsumed in the religious mission of the church institutions.

Having established the sectarian character of the schools involved, Respondents argue that the teacher services are delivered by Petitioner School District to these *schools*, not to the individual *students*, who could independently obtain the same services at the nearest public school building. The thrust of the program was to subsidize religious schools by augmenting their teaching staffs through the Shared Time Program, and to supplement the salaries of their teachers and administrative personnel through the companion Community Education Program; also, it served to broaden the curriculum of the religious schools. This constitutes significant, direct financial aid to the sectarian institutions in violation of the Establishment Clause.

Respondents argue that the programs resulted in extraordinary entanglement between government and religion in the process of actual delivery of these services to the religious organizations, in violation of the Establishment Clause. The entanglement showed up in duplication of teaching positions, where a teacher employed full-time by the religious organization was hired by the public school district to teach additional subjects in the before-school or after-school Community Education Program. It also showed up in the questionable hiring practices of the public school district which produced Shared

Time teachers who were previously employed by a church school and who, as newly-hired public school teachers, were sent back to those same religious schools to teach the very same students. Despite the obvious potential for such a teacher to inject religious content into her "public school" classes, Petitioner School District steadfastly insisted that none of these Shared Time or Community Education classes was, or should be, monitored for religious content.

If classes in physical education, art, music, reading, math, and industrial arts can be delivered by the public school district to the sites of religious schools agreeably with the Establishment Clause, what reasoning would prevent delivery of classes in English, Algebra, Geometry, Latin, Chemistry, Physics, and Government? If this Court decides that any academic subjects may be provided by the government on the site of and in the buildings owned and operated by religious organizations, thereafter there is no place to stop short of the public shouldering the entire schedule of academic classes offered in religious schools. Justice Clark expressed Respondents' argument well in these words:

"The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963).

In further developing that argument, Respondents point out that the challenged programs, if sanctioned by this Court, would lead to a dual system of public schools wherein the children in one of the companion systems are segregated according to religion and, probably, according to race as well. The Sixth Circuit Court of Appeals called attention to this important aspect of the case at

40a. (718 Fed 2d, at 1406). Respondents submit that the uniquely *public* function of this Nation's public school system is on the line in this case, a function which has provided strong impetus to unification of our peoples despite the extreme diversity of our religious and ethnic backgrounds. Respondents ask, in argument, whether we are about to turn our backs on that system of free, public schools which has made our Nation the envy of the world and, despite the luxury of nearly 200 years without religious strife and turmmoil, return to a program of government sponsorship and subsidy of religion like that existing in Northern Ireland where the government supports both Catholic and Protestant schools and where the entire society is segregated according to religion from the cradle to the grave?

## ARGUMENT

### I.

Respondents proved by a great volume of evidence that the nonpublic schools receiving shared time and community education programs from Grand Rapids school district are pervasively sectarian.

The Supreme Court of the United States has never adopted a specific "profile" of a pervasively sectarian school. At page 767 of *Nyquist, infra*, the Court listed eight factors which could impact such a consideration, but then commented, "Of course, the characteristics of individual schools may vary widely from that profile." In *Meek v. Pittenger*, 421 U.S. 349, 356 (1975), the Court listed ten factors taken from the Complaint of Plaintiffs. In *Wolman v. Walter*, 433 U.S. 229, 234 (1977), there is no listing of any special factors or criteria, but the Court discusses various features of the sectarian schools involved in the case and at page 235 adopts the District Court's conclusion:



Although the stipulations of the parties evidence several significant points of distinction, the character of these schools is substantially comparable to that of the schools involved in *Lemon v. Kurtzman*, 403 U.S. 602, 615-618 . . . (1971). 417 F. Supp., at 1116.

The only "test" adopted by the Supreme Court is that contained in *Hunt v. McNair*, 413 U.S. 734, 743 (1973), where it referred to aid flowing to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."

At trial, Respondents offered, and authenticated by 17 witnesses, about 75 exhibits bearing on this subject. Without intending to be repetitious, Respondents wish to emphasize certain exhibits which were not commented upon by the Courts below.

At Marywood Academy "Catholic beliefs are fully integrated into the total curriculum. Every student participates in daily religious class and weekly Mass or Prayer Service." Also, "Marywood Academy is staffed with dedicated, certified teachers who are committed to Christian education". Exhibit 3 (J.A. 392). It is interesting to note, in connection with that commitment of the Marywood teachers to Christian education, that the curriculum courses listed in the pamphlet include several *Shared Time classes*, particularly Art, Music, and Physical Education.

The Christian School Association has gone out of its way to publicize the sectarian mission of its member schools. Exhibit 65 is an advertisement placed in the GRAND RAPIDS PRESS by the Association loudly proclaiming, "CHRISTIAN SCHOOLS BELIEVE THAT GOD MADE EVERYTHING." It continues:

That's why they see Him in MATHEMATICS . . . and HISTORY . . . and SCIENCE and ENGLISH—and all the other subjects they teach. (J.A. 270).

It is difficult to conceive of a more pointed reference to the Association's philosophy of *integrating religion into the curriculum*. Secular and sectarian functions are, by admission, inseparably bound together such that aid to one is aid to the other. A Shared Time teacher sent into this strong sectarian environment, particularly a teacher of the Christian Reformed Faith, would find it difficult to perform in a manner contrary to the avowed mission of the Christian school program.

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. *Lemon*, 403 U.S., at 618.

In *Lemon*, the teachers were employed by the parochial schools, whereas they are employed by the public school district here. However, many had been previously employed by the religious schools before taking positions in the Shared Time program, so their commitment to the philosophy of Christian education could easily surface in the atmosphere described above. At the very least, such a teacher placement invites rampant abuse of Petitioners' rule or regulation prohibiting infusion of religious content into the "public school" Shared Time classes.

In *Lemon*, as in the instant case, teachers testified that they did not inject religion into their secular classes. *Lemon*, page 618. But in both *Lemon* and *Meek* the Court found that the strong potential for abuse required "a comprehensive, discriminating, and continuing state surveillance" to ensure that the First Amendment was respected.



See, also, Exhibit 82 (J.A. 279), the one-half hour documentary purchased and aired on local TV April 20, 1982 by Grand Rapids Christian School Association. The transcript contains many references to the practice of integrating religion into every subject in the curriculum. (J.A. 412-414). Courses specifically mentioned are Mathematics, Music, and Art, and the impression is conveyed that Christianity is integrated into those classes even though they are "public school" Shared Time offerings.

Petitioners' argument that only the *children* receive educational benefits ignores (1) the supplement given to the salaries of parochial school teachers; (2) the rental payments made direct to the religious schools (J.A. 426, 427), which totalled about \$200,000 in 1981-82; (3) the resulting ability of the religious schools to offer a full curriculum to their students (J.A. 144, 145, 147) and to advertise this fact in order to increase enrollments (J.A. 448-454); (4) the prohibitive cost of replacing these programs, according to testimony of several witnesses (J.A. 108, Paragraph 6); and (5) the admitted fact that these courses are annually offered by GRSD to, and accepted by, the *nonpublic schools*. The District has no contact with children or parents in arranging these classes. (J.A. 336-338, 440).

Clearly, the government aid is to *religious schools*, not to individual students who could independently obtain these educational services by merely enrolling part-time or full-time at the public school nearest the residence of each such student. GRSD provides educational services to the religious schools in a manner which enables them to maintain student bodies as homogeneous units without any admixture of foreign elements such as public school students, thereby permitting the religious schools, in the

words of the Court below, "to retain their private religious character". 22a.

The claim made at page 34 of Petitioners' brief that the religious schools are not church-governed is at least misleading. In regard to the Roman Catholic schools, Exhibit 45 (J.A. 262 et seq.) is the Bylaws of the Catholic Interparochial High School Association. It states that the Board of Directors shall consist of 17 members:

- five Catholic priests
- one from the Dominican Sisters
- one from the School of Sisters of Notre Dame
- the Bishop of the Roman Catholic Diocese
- nine lay men or women elected by vote of electors from the parishes assessed for the benefit of the two Catholic High Schools.

It should be obvious from a listing of these qualifications that every person on the Board would be a member of the Roman Catholic Church, and this was confirmed by the testimony of Deacon Dale Hollern. Exhibit 36 lists the lay members, all of whom are Roman Catholic, according to Deacon Hollern, who is the Principal of Catholic Central High School.

Note, also, the provision for "Episcopal Veto" in Article XIV (J.A. 269). The Board does not have final authority upon any matter; the Bishop has such final authority. Thus, the two Catholic High Schools are operated under the total control of the Bishop of the Roman Catholic Church, not by "elected, lay boards" as claimed by Petitioners.

With reference to the Grand Rapids Christian School Association, which controls six Christian schools, Exhibit 77 is the Bylaws of the Association (J.A. 271). Member-

ship in the Association and membership on its governing Board are *restricted* to those who subscribe to a doctrinal "Basis" found in Section 1.3. The final paragraph of this "Basis" deserves special emphasis:

- (e) The Christ proclaimed in the infallible Scriptures is the Redeemer and Renewer of our entire life, thus also of our teaching and learning. *Consequently in a school which seeks to provide a Christian education it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-pervading force in the educational program.* (Emphasis supplied).

Immanuel-St. James Lutheran School is supported and run jointly by Immanuel Lutheran and St. James Lutheran Congregations. The responsibility for the educational program rests in the hands of the Joint Board of Education. Each congregation elects three of its members to serve on the Board. The pastors, principal, and assistant principal are advisory members. Page 7 of Exhibit 18 (J.A. 419). Again, as with the Catholic and Christian School Programs described above, voting control is such that it is highly unlikely that a non-Lutheran would ever become a member of this Board.

The claim of Petitioners that these schools do not limit student admissions on the basis of religion is also a misrepresentation of the evidence. Of the 40 religious schools, only three were revealed as having any significant religious minority in the student body. (J.A. 121, 137, 394).

Exhibit 68 is an Application for Admission to a school of the Association. Note that it requires the parent to attest that he is either a member of the Association and subscribes to the "Basis Statement" or that "we do concur that our child(ren) shall be taught according to the prin-

ciples contained therein". Certainly, such an application imposes religious restrictions upon the admission of students, contrary to the statement of the Superintendent of the Christian Schools at J.A. 136.

Exhibits 59-64 also demonstrate the restrictions upon admission to Christian Schools. These exhibits are four-page hand-out literature briefly describing the program at each of the six Christian schools. All contain slight variations of the following statement:

All parents, regardless of which church they attend, are welcome to look into the educational program at Sylvan Christian School. *All students whose parents express their commitment to the Christian education offered at Sylvan* are accepted without regard to race, color, national or ethnic origin. (Emphasis added). Exhibit 63 (J.A. 409).

The homogeneous enrollment in Catholic schools is typified by Immaculate Heart of Mary School. Sister Janet Mish, Principal of the School, testified that out of the total enrollment of 424, 410 are Catholic. The 14 non-Catholics are distributed among the nine grades (K-8) in the school. (J.A. 387).

Exhibit 34 is a statistical breakdown of students enrolled in Catholic Central High School. Of the total of 909 students, 877 are Catholic. (J.A. 260). The school does not specifically restrict enrollment to Catholic students, but enrollment statistics indicate little interest on the part of non-Catholics, their number being only 3.5% of the student body.

Petitioners claim at page 34 of their brief that these religious schools do not limit staff hirings on the basis of religion. Again, they encourage the inference that faculties contain significant numbers of persons of minority religions. This is simply not so.



Exhibit 35 is a statistical breakdown of assistant principals and teachers at Catholic Central High School according to religion. (J.A. 261). Of the 46 persons listed, six are members of the clergy of the Roman Catholic Church, 35 are Catholic lay teachers, and five are other denominations. In addition, Principal Dale Hollern, who is not listed, is Roman Catholic.

Sister Janet Mish has 17 teachers on her faculty, including three teaching nuns, all of whom are Catholic. The board of Immaculate Heart of Mary School consists of seven lay persons elected by the parish by ballot and four ex-officio members, including the principal, pastor of the church, and two others. All 11 are Catholic. J.A. 387, paragraphs 11, 15.

Regarding the Lutheran schools, Exhibit 18 at page 8 states "the teachers of Immanuel-St. James Lutheran School meet all the requirements of Synod for its parochial school teachers . . .". Thus, the Lutheran Church-Missouri Synod *does* limit or control staff hirings. (J.A. 423).

The expressed philosophy of Lutheran schools directs integration of religious doctrine into the entire curriculum, including secular courses. "All subjects are taught with a Christian approach and from a Christian point of view." (J.A. 423, Exhibit 18). "A Christian atmosphere permeates the daily instruction of religion, language arts, math, science, art, music, and physical education." (J.A. 425, Exhibit 12). Interestingly, art, music, and physical education are Shared Time "public school" classes which are *supposedly taught by public school teachers*. Do they supply the "Christian atmosphere" which, according to the school's literature, exists in those classes? Certainly, there is the *opportunity* for any Shared Time teacher who wants to do so.

Petitioners claim at page 34 that these religious schools do not inculcate religion, that they provide religious instruction separate and apart from their secular educational function, and that no student is forced to participate in religious worship.

Page 8 of Exhibit 18 (J.A. 423) destroys these claims with respect to the Lutheran schools. Clearly, that page directs an element of coercion in the participation of every student, *even non-member children*, in religious instruction, Confirmation classes, etc.

Regarding the Catholic schools, page 3 of Exhibits 21 and 22 (J.A. 239) demonstrates the dominating role of religion and religious instruction in the curriculum at Catholic Central High School. Out of a total of 21 units required for graduation, four are in religious education. For comparison, Math is only two units, Social Studies two units, and Science one unit. On the same page 3, note that "four years of daily attendance in a Religion class offered at Catholic Central High School is required of all students who attend Catholic Central High School." There is an exception to this policy, but Principal Hollern testified that few students request the exemption.

Without detailing expressions in the other Exhibits which disprove Petitioners' claims stated at page 34, Respondents believe that Sister Marie Heyda expressed it well in her 104-page book "Catholic Central and West Catholic High Schools, a History of Diocesan Venture 1906-1981" at page 80:

Certainly religion and the values of the spiritual life must always be an integral part of the atmosphere of the Catholic high school for in the modern age *they are the only reason for its being*. (Emphasis added) Exhibit 20.



## II.

**Schools which are pervasively sectarian provide an integrated secular and religious education, and any substantial government aid to the educational function necessarily results in impermissible aid to the sectarian school enterprise as a whole, in violation of the Establishment Clause.**

The opinion of the Court below discusses and compares lower Court decisions which involved lease arrangements similar to that in the instant case, reaching the conclusion that it is substantially similar to lease programs invalidated in four U. S. District Court cases decided between 1972 and 1980, including *Americans United for Separation of Church and State v. Porter*, *supra*. 22a, 23a. Respondents were able to find only one decision involving a lease program conducted by public authorities in sectarian schools which does not comport with this line of authority, that being *Citizens to Advance Public Education v. State Superintendent of Public Instruction*, 65 Mich. App. 168 (1975), 237 N.W.2d 232, (Leave to appeal denied, 397 Mich. 854). Even there, the Court acknowledged in a footnote at page 180 that its decision did not harmonize with the weight of case authority.

One feature of this program noted by the Court below at 31a deserves emphasis:

... The record also discloses that no evidence was offered by Defendants that any of the participating students come from public schools. As a matter of fact, one witness admitted that a public school student would not be permitted to enroll in a Shared Time class even though that program was "public". Though Defendants claim the Shared Time program is available to all students, the record is abundantly

clear that only nonpublic school students wearing the cloak of a "public school student" can enroll in it.

As is stated in the above excerpt, Petitioners claimed in the earlier phases of this case that Shared Time classes were "open to all students, regardless of such students' school of primary attendance." Proposed Findings of Fact of Defendants and Intervenors, paragraph 139 (J.A. 326). It was, and is, important for Petitioners to establish this point in order to make even the faintest assertion that these are "public school classes" and that the students are "public school students".<sup>1</sup> At the time the program was created by Grand Rapids School District in 1975 there was an awareness of the rules set forth by the Michigan Supreme Court in *Traverse City School District v. Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971), relating to Shared Time at the public school (*Id.* at 412), Shared Time on leased premises (*Id.* at 415), and Shared Time at the nonpublic school (*Id.* at 415). As to the latter two, the Michigan Supreme Court specifically imposed the requirement that Shared Time courses must be "open to all eligible to attend a public school". Consequently, in drafting its lease for Shared Time classrooms in religious schools, GRSD specified on page 1 that the leased property "is open to all students eligible to attend public schools". (J.A. 202).

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<sup>1</sup>Another hurdle in the path of masquerading these children as "public school students" is found in the uniforms they are required to wear. Exh. 1, page 8; Exh. 4, page 5; Exh. 6, page 6. Neither GRSD nor the several religious schools provide an exemption from the "Dress Code" while the child is in "public school" Shared Time or Community Education classes. Does he nonetheless achieve transition to the status of "public school student" while wearing the uniform required by the religious school?

Of course, merely reciting in a lease that the classes are open to all students eligible to attend a public school does not make them available to such students. There was no evidence that these programs were designed to serve, or did serve, public school students. Indeed, the contrary was true; they were designed to serve nonpublic school students. (J.A. 457, paragraph 184). Interestingly, Petitioners no longer deny this, and their Brief does not even mention the point. Instead, they now claim the classes are conducted "under conditions of public school control". Respondents have discussed that claim in Section IIIB *infra* in this Brief.

Where it appears that *all* of the students who benefit from the Shared Time classes are enrolled in the sectarian school for the balance of their courses, it becomes obvious that the program is designed, not as a benefit to *children*, who could receive the classes simply by going to a public school, but to channel taxpayer funds to the *sectarian school*. This important point was highlighted in *State of Nebraska ex rel School District of Hartington v. Nebraska State Board of Education*, 188 Neb. 1, 195 N.W.2d 161, cert. denied, 409 U.S. 921 (1972), where the lease program was upheld by the Nebraska Supreme Court and, in effect, by the United States Supreme Court in denying certiorari. The Opinion of Justice Brennan and the dissenting Opinion of Justice Douglas make it clear that "students from both the public and the private school would attend these classes" held in two classrooms leased by Hartington Public School District from the Cedar Catholic High School. Indeed, Justice Brennan specifies the exact number—91 public school and 48 parochial school children. Thus, a good faith, arms-length lease of space in a parochial school was upheld *where the feature of "student body identity" was found not to exist*.

With the exception of *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); and *Mueller v. Allen*, 103 S.Ct. 3062 (1983), which upheld, respectively, transportation and textbook aid to church schools and income tax deductions for tuition and other school expenses, the decisions of this Court, at least with reference to elementary and secondary schools, have consistently rejected efforts to channel tax-raised funds to church schools. The principal, landmark cases along that route have been the following:

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court invalidated a purchase-of-secular-services statute.

In *Earley v. DiCenso*, 403 U.S. 602 (1971), it held unconstitutional a teacher salary supplement law.

In *Sanders v. Johnson*, 403 U.S. 955 (1971), it affirmed a lower Court opinion which invalidated a purchase-of-secular-services program similar to *Lemon, supra*.

In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), it invalidated a tuition reimbursement law, a tax credit law, and a law giving maintenance and repair grants to parochial schools.

In *Sloan v. Lemon*, 413 U.S. 825 (1973), it invalidated a tuition reimbursement law.

In *Essex v. Wolman*, 409 U.S. 808 (1973), it affirmed without opinion a District Court decision ruling unconstitutional a general tuition grant law.

In *Grit v. Wolman*, 413 U.S. 901 (1973), it affirmed without opinion a District Court decision barring tax credits for parents of parochial school pupils.

In *Brusca v. State Board of Education*, 405 U.S. 1050 (1972), it affirmed a holding that exclusion of parochial schools from tax-funding of education did not violate con-



stitutional rights of parents sending children to such schools.

In *Franchise Tax Board v. United Americans for Public Schools*, 419 U.S. 890 (1974), it affirmed a District Court decision invalidating tax reductions for parents of parochial school pupils.

In *Luetkemeyer v. Kaufman*, 419 U.S. 888 (1974), it affirmed a District Court decision upholding a Missouri law limiting free transportation to pupils attending public schools.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), it invalidated, except in respect to the loan of textbooks, a statute which provided so-called auxiliary services to parochial schools.

In *Wolman v. Essex*, 421 U.S. 982 (1975), it reversed and remanded a District Court decision upholding the constitutionality of an Ohio auxiliary services law, whereupon the District Court determined that it was not constitutionally distinguishable from the statute in *Meek* and adjudged it unconstitutional.

*Meek* was decided on May 19, 1975; *Wolman v. Essex* on May 27, 1975. Three months later, Ohio enacted a new auxiliary services law which was invalidated as to instructional services and equipment in *Wolman v. Walter*, 433 U.S. 229 (1977).

The instant case follows the change-in-form-but-not-in-substance pattern outlined above. The substance or end-result of the lease device, which is designed to create a "pocket" public school, is virtually identical to the purchase-of-services device outlawed in *Lemon v. Kurtzman*, *supra*, and the salary supplement method in *Earley*. GRSD has signed a lease which gives it access to the premises

of a parochial school. And the purpose for which this legalistic access is sought is to confer substantial financial benefits upon the parochial school in the form of employing and paying from tax funds the teachers who teach secular subjects in leased classrooms of the parochial school building.

The Community Education program here is almost identical to Rhode Island's Salary Supplement Law struck down in *Earley*. In that case the State paid to the parochial school teacher a percentage of the full-time salary, based upon the portion of time devoted to teaching of "secular subjects". In the instant case, the parochial school teachers are employed by GRSD to teach specific "secular subjects" after regular school hours. (J.A. 348). The teacher subsidy in *Earley* was a percentage up to 15% of the teacher's existing salary; in the instant case it is a weekly or hourly rate of pay based upon services performed. See J.A. 434-436.

The salaries of many administration personnel at religious schools are also supplemented by employing them in the *administration* of the Community Education program. (J.A. 434-440). Thus, Sister Regina Mary Godell, Assistant Principal at Immaculate Heart of Mary School, also runs the Community Education program at that school as an employee of GRSD (paragraph 116 at J.A. 434); Edward Wagner, Principal of West Catholic High School, is paid \$3,000 per year as "Coordinator" of GRSD's Community Education program at that school (Id. paragraph 118); the same combination of positions is held by Deacon Dale Hollern, Principal of Catholic Central High School, and his Assistant Principal (Id., paragraph 120); the same situation exists in Sacred Heart and St. Stephen



Catholic elementary schools. (Id., paragraphs 122, 123). The teacher salary supplement has, thus, progressed to a *merger of administrative functions*, wherein persons employed in the administration of parochial schools have become employed by GRSD to administer its programs. Entanglement in respect to teaching personnel has been extended to the administrative level, so that a single person is found to be in charge of both sectarian school affairs and "public school" programs. The cooperative dependency which indicates the attainment of forbidden administrative entanglement has approached the status of an *actual merger* of the two systems. In the oft-repeated quotation from *Everson* which spells out the impact of the Establishment Clause, it is stated that "neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." 330 U.S., at 15. Here, we have an aggravated violation of that principle.

The Supreme Court has analyzed recent cases in this field by application of a three-pronged test. (See *Committee for Public Education v. Nyquist, supra*). First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

In analyzing this program under the second prong of the test, it is important to note that the Court below found that the schools receiving these classes are pervasively sectarian in the sense that they are operated "with the advancement of their various religious faiths as a primary purpose." 35a, 10a. Various exhibits of Respondents un-

derline the extent of integration of religious principles into the total educational curriculum of the sectarian schools. In schools where secular and sectarian activities cannot be separated, the aid given by GRSD constitutes direct subsidy to the religious institutions, in violation of the Establishment Clause of the First Amendment. Supreme Court cases relied on to support this proposition are discussed and analyzed by District Judge Enslen at pages 97a-105a. See, especially, the exhaustive analysis of *Meek v. Pittenger, supra*, and *Wolman v. Walter, supra*, at pages 99a-105a.

The discussion at pages 245-246 of *Wolman* is particularly appropriate to the facts here. The Court approved therapeutic, guidance, and remedial services for nonpublic students *when performed in public schools, in public centers, or in mobile units located off the nonpublic school premises*. The discussion in the Court's Opinion centers around the possibility that mobile units serving only nonpublic school students might be located in close proximity to a sectarian school and "might operate merely as an annex of the school or schools it services". The Court responded to that expressed fear:

At the outset, we note that in its present posture the case does not properly present any issue concerning the use of a public facility as an adjunct of a sectarian educational enterprise. The District Court construed the statute, as do we, to authorize services only on sites that are "neither physically nor educationally identified with the functions of the nonpublic school." 417 F. Supp., at 1123. Thus, the services are to be offered under circumstances that reflect their religious neutrality.

In the instant case, no such "religious neutrality" is possible because Shared Time classes are conducted with-

in the sectarian school building. The inference in *Wolman* is clear that such a factual circumstance would have invalidated the therapeutic, guidance, and remedial services in issue in that case.

To the same effect is *Wheeler v. Barrera*, 417 U.S. 402, 428 (1974), where Justice Powell in his concurring Opinion said:

I would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools.

One additional point was touched upon by District Judge Enslen at page 107a, but was not otherwise developed in his Opinion. In discussing the complete identity of the student body in the "public school" classes and the nonpublic schools, he said, "Since there are, in fact, no public school students participating in the instant programs, the nonpublic schools are permitted to retain their private religious character."

Judge Enslen has called attention to a whole new facet of this Shared Time program inside sectarian school buildings, namely, the *segregation* aspect of it. If these Shared Time and Community Education classes conducted by GRSD within sectarian school buildings are part of its total public school program, the school district has established and is maintaining a dual public school system which segregates students according to religion, in violation of the Equal Protection Clause of the Fourteenth Amendment. Also, since that dual public school system would, in the words of Judge Enslen at page 107a, permit the nonpublic schools "to retain their private religious character" while receiving government benefits in the form of public educational services, the program provides sig-

nificant aid to the religious mission of the sectarian schools in violation of the Establishment Clause.

The "private religious character" of religious schools cannot be maintained in classes where nonpublic students and public school students are *mixed together*. Such mixture does not occur in the Grand Rapids program, but it *did* exist in the lease program approved in *Hartington*, *supra*, discussed above in this Brief.

Further evidence that the aid involved here is significant in amount and direct to the religious school is found in the fact that the expense of providing certain courses taught at the religious schools was transferred to the taxpayers in the course of implementing these programs. For example, Physical Education is a Shared Time class at the non-public schools. As stated by the Shared Time Physical Education Supervisor, "In all cases the service we offer in terms of its scope exceeds the service that was otherwise available to the nonpublic students." (J.A. 83). Thus, it appears the Shared Time program improved the scope and quality of physical education classes previously available.

The value of these classes to the private schools was stated over and over again by various school administrators. (J.A. 451-454). The fact that many of the course offerings may be supplementary to the core curriculum may render them more beneficial to the religious school than if they duplicate or replace existing classes, as the effect is to broaden the curriculum and thereby attract students seeking a wider choice of classes and careers.

Respondents have charged that this program enables the Public School District to gradually take over the academic program of the religious schools. Note, in Exhibits

21 and 22 the subtle way this is accomplished. (Paragraph 165 of J.A. 450). Those exhibits are successive annual editions of the Curriculum Guide of Catholic Central High School. At page 6-3 of Exhibit 21 (1981-82 Edition), "Yearbook 522" is a course offered by the staff of that high school; but at page 6-3 of Exhibit 22 (1982-83 Edition), that same course, which produces the annual yearbook of the high school, has become "Yearbook 922" and is offered in the Shared Time program. In the next edition what is to prevent transfer to the taxpayers, under the title of a journalism course, of responsibility for composing, editing, and printing the Curriculum Guide itself, which contains four pages devoted to the Religion Department of the school?

Note, also, that "Yearbook" is an after-school Community Education class at Holy Spirit School and Oakdale Christian School. (J.A. 207, 210, 213). If the programs in issue are permitted to continue, how long will it be before the taxpayers are publishing the yearbook of every religious school in Grand Rapids and Kent County?

How could the government involve itself more intrusively in the operation of a private, religious educational institution than to take over the publication of the annual yearbook of that school? At this point we must certainly have reached or exceeded the limit of governmental participation in the affairs of a religious organization.

### III.

The program in issue produced excessive administrative and personnel entanglement, as well as political entanglement, between government and religion, in violation of the establishment clause.

The third prong of the *Nyquist supra*, test, the potential for excessive government entanglement with religion, provides an even stronger reason for invalidating these programs. This facet is confronted at 30a-34a of the Opinion below. These classes had become so clearly an integral part of the curriculum of the sectarian schools that a cooperative dependency (entanglement) became inevitable. Given the increase in the size of the program during the past six years, including the number of students, number of teachers, and the huge increase in cost to Michigan's taxpayers, it becomes logical to envision a developing administrative and personnel *merger* between religious schools and public schools within the GRSD. The time to arrest this merger is before it becomes cemented to the point where it cannot be easily dismantled.

Respondents have addressed entanglement in the preceding section and other portions of this Brief. Exhibits which exemplify this element are described at J.A. 425-444.

In addition to the entanglement of teaching personnel and administrative functions, the Court below found a potential for impermissible "political divisiveness", also known as political entanglement. 26a-29a. The exhibit discussed there is found at J.A. 245, 246. This fourth prong of the test was first enunciated in *Lemon v. Kurtzman, supra*, 403 U.S., at 622. When government action in a sensitive area causes political division along religious lines, this has been held to be a "warning signal" of constitutionally impermissible activity. *Nyquist, supra*, at 794.



Another "warning signal" was sounded March 7, 1984 when the State Board of Education of the State of Michigan, which is one of the Petitioners, voted 5-2 to discontinue its participation in this case. See Note 6 at page 4 of Petitioners' Brief. A mere "*potential* for political divisiveness" has become a *reality*. The elected members of the state agency having responsibility for supervision and leadership of public education in Michigan have divided on the issue of state taxpayer funding of teaching services performed on the site of religious schools. At the next election of members of the State Board of Education, each candidate may be required to announce a position, and the electorate can be expected to divide on the issue. For each voter, the point of division may be whether his religious denomination expects to benefit from the program. This is precisely the kind of political activity which the Establishment Clause was designed to prevent. *Lemon, supra*, 403 U.S., at 622. Madison wrote of this potential for religious competition:

"It (the Bill for religious assessments) will destroy that moderation and harmony which the forbearance of our laws to intermeddle with religion, has produced amongst its several sects . . . . The very appearance of the Bill has transformed that 'Christian forbearance, love and charity', which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?" *Memorial and Remonstrance Against Religious Assessments* (1785), paragraph 11.

- A. With reference to classes conducted by the public school district on the site of religious schools, failure to monitor for religious content invites rampant abuse of restrictions by teachers who may have a personal religious commitment to the particular religious school or its denomination of religion.**

Petitioners have urged at pages 18 and 24 of their Brief that there is no proof of any attempt on the part of a Shared Time teacher to inject religious content into a Shared Time "public school" course. However, with these classes being conducted in the sectarian environment of the religious schools, it is unlikely that infusion of religious content would ever be reported outside the classrooms. The reasons are as follows:

1. Student bodies of these schools are extremely homogeneous in religious affiliation. (See Argument, Part I, this Brief). It would be unusual to find more than one non-Catholic in any classroom of a Catholic school, or more than one non-Lutheran in any classroom in a Lutheran school. In such a school environment where religion and religious exercises are a standard part of the classroom routine, it is not likely that any student would notice or object to the same kind of religious content in *Shared Time* classes.

The atmosphere of a school which is owned and operated by the public school district is entirely different. Classes are attended by students of all religions and no religion. Also, members of the public have ready access to the building and to classrooms within the building so that they may monitor classes conducted therein. If any religious material finds its way into the curriculum of such a public school, it is immediately reported by a student, by a parent whose child has reported it to him, or

by a member of the public who may have visited the classroom. This was exactly what occurred in *Abington School District v. Schempp, supra*. Edward Lewis Schempp, his wife, Sidney Schempp, and their children, Roger and Donna, were all members of the Unitarian Church. They objected to reading of Bible verses which conveyed literal meanings contrary to their religious beliefs. The religious diversity of a public school student body makes it impossible to conceal for long any activity which might constitute a violation of church-state separation.

2. The lease, received as Exhibit 74 and Exhibit HHH (J.A. 202), specifies that lessee is the Grand Rapids Public Schools and gives a right to access to *lessee and its public school employees*.

None of the leased buildings was marked on the exterior as a "public school" or "public school annex" or in any other manner to indicate to a member of the public that he or she would be welcome on the premises. As a matter of common sense, a member of the general public would be a mere trespasser upon this private property, having no right to enter or in any way monitor classes conducted there. Thus, it is not surprising that there is no reported instance of any member of the public monitoring a class or reporting or complaining regarding its subject matter.

3. In the escalating entanglement which marked this Shared Time Program over a period of several years, Respondents were successful in identifying 13 Shared Time teachers who were employed by GRSD after previously being employed by the religious schools involved. This was 10% of the total teachers in the daytime Shared Time Program. (J.A. 193). Many more, about 300, were employed full-time by the religious schools and part-time

in before-school or after-school community education "public school" classes at the various religious schools. A discussion of this factor appears in the Opinion of the Court below at 31a-34a. Nevertheless, a more detailed analysis of this feature is necessary to show the close personal contacts which existed between these "public school" teachers and the sectarian schools and their students.

Exhibit 51 is a nine-page "Student Handbook" distributed by Millbrook Christian School for the year 1981-82. Page 2 contains a "staff list" of teachers in the elementary and junior high. Three teachers on the list, being Mrs. Gwen Pott, Mr. Clare Vredevel, and Mrs. Shirley VanWoerkom, are public school Shared Time teachers, but they are not so identified on this list; to the contrary, it would appear that all of the listed persons are employed by and responsible to Millbrook Christian School. (J.A. 442, paragraph 139). The same is true of classroom schedules shown at pages 5 and 6, no distinction being made between Shared Time classes and other classes conducted by the religious school. Page 7 is a sketch showing the location of every teacher on the staff. Again, there is no distinction drawn between Shared Time teachers and other teachers. A person examining this Exhibit quickly reaches the conclusion that GRSD has achieved an administrative and teacher merger with the religious school in the process of extending its services to that school.

The same conclusion is compelled by examination of Exhibit 47, the staff handbook of Seymour Christian School for the year 1981. The teachers are listed in the "staff directory" at page 2, and four of these are Shared Time teachers employed by GRSD, being Norma Bratt,



Charlotte DeVries, Gwen Pott, and Dick VanderKamp. There is no asterisk identifying them as public school teachers, and a person reading the list would conclude that they are on the staff of Seymour Christian School. (J.A. 443, paragraph 141). Again, page 5 contains a drawing of the layout of the building, with a numbering system to identify the placement of teachers in various classrooms. The names of two of the above teachers appear, as well as the location of their rooms, but no mention is made of "public school" teachers or "public school" classrooms. Other exhibits with similar content are 48, 50, 52, 53, 54, 55. (J.A. 422, 443). Many of these public school Shared Time teachers were previously employed by the very same religious school, teaching the same subject to the same students. Is it reasonable to presume that such a teacher, who previously led a prayer at the outset of the school day or at the opening of a class, would be able to gracefully forego such a perfunctory part of the routine of the religious school? At least, the circumstances are such that GRSD should have recognized a potential for abuse of its regulations. Even so, no monitoring for religious content was ever conducted!

In *Meek v. Pittenger*, supra, the teachers were employed by the public school district to provide auxiliary educational services in sectarian schools. There was no evidence that any of the teachers had been previously employed by the religious schools. At page 370, the Court said:

"That Act 194 authorizes state-funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this case from *Early v. Dicenso* and *Lemon v. Kurtzman*, supra. Whether the

subject is 'remedial reading', 'advanced reading', or simply 'reading', a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." 421 U.S., at 370.

And at page 371, the Court continues:

"The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary services personnel, because not employed by the non-public schools, are not directly subject to the discipline of a religious authority. Cf. *Lemon v. Kurtzman*, 403 U.S., at 618. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. See *Id.*, at 618-619. The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." 421 U.S., at 371.

The failure of GRSD to monitor these classes invited rampant abuse of its rules prohibiting infusion of religious subject matter.

**B. Far from being under public school control, these classes conducted within the buildings operated by religious schools are under predominant control of administrative personnel of those religious schools.**

The Michigan Supreme Court in 1971 spelled out the necessary features of a Shared Time program conducted



on leased premises or at the nonpublic school. *Traverse City School District v. Attorney General*, supra. One requirement was that it must be "under the authority, control and operation of the public school system by public school personnel". Another was that it must be "open to all eligible to attend a public school". 185 N.W.2d at 19. The latter requirement is not even discussed in Petitioners' Brief and it is apparent they are no longer claiming this factor exists, in the wake of irrefutable evidence that not one single public school student ever has attended even one of the classes involved in this case. (J.A. 431-433). However, Petitioners continue to claim these classes are conducted "under conditions of public school control", even though the following features have evolved:

1. GRSD has no control over enrollment. It merely accepts students delivered to its "public school" classes by the religious school, some of whom come from outside the boundaries of the District, or even outside the county. (J.A. 457). By contrast, attendance at school buildings owned by the District is strictly regulated by geographic attendance boundaries.

2. There is no effort to distinguish resident from non-resident students. All children enrolled at the religious school are eligible for Shared Time classes. By contrast, a non-resident student may apply for admittance to a public school operated by GRSD and, if such application is granted, he is admitted as a *tuition* student. (J.A. 456, 457).

3. GRSD has no control over the days when the religious school will be open, the hours it will be open, or the holidays it will observe (including religious holidays).

4. GRSD has no control over parent-teacher conferences (J.A. 443, paragraph 143, and J.A. 445, paragraph

151), assemblies, extra-curricular activities of its "public school" students, or any non-academic events at the Shared Time "public school". If it wants to assemble all of its "public school" students, this must be arranged through the administration of the religious school.

5. GRSD has no administrative personnel on site. It relies entirely on the administration of the religious school to produce a student body for classes and to supply all auxiliary educational needs such as library facilities and parent-teacher contacts.

6. GRSD has exercised only limited control over the hiring of teachers and the assignment of these teachers to specific schools. Indeed, the religious schools seem to have exerted effective control and influence in acquiring for their "public school" Shared Time classes specific teachers who were previously employed by that particular religious school. Now, under the title of "public school Shared Time teacher", they are back teaching the same classes in the same building to the same students. (J.A. 433 et seq.).

7. The lack of District control in the personnel area has produced extraordinary overlapping and entanglement between the public school administration and that of the religious schools. (J.A. 433 et seq.). In many instances, teachers at the religious schools wear several "hats", being employed simultaneously by GRSD and by the religious school. (J.A. 437, 438). Considering the large number of public school buildings and religious school buildings listed at J.A. 215-220, assignment of so many Shared Time teachers back to school buildings where they had taught as employees of the religious school could not be mere coincidence; clearly, *the religious school organiza-*

tions maintained considerable control over assignment of *Shared Time* teachers so that they were able to acquire those who were philosophically and spiritually in harmony with the sectarian environment of the particular school.

8. GRSD did not monitor these classes for religious content and, therefore, exercised no control over the infusion of sectarian flavor. Certainly, classes of the character described in the two preceding paragraphs required surveillance, but the firm rule of GRSD was that no classes were to be monitored for religious content. (J.A. 429-431, paragraphs 100, 101, 103, 106). Note in paragraph 103 that the Community Education Coordinators and aides who had immediate responsibility in this sensitive area were employed part-time by GRSD and full-time by the religious schools. In addition, many of the principals of religious schools were also teachers in the Community Education Program. What would be the degree of likelihood that the Principal of St. Stephen's School while teaching a Community Education class to his students in the religious environment of his school (J.A. 394, 395, 437) would attempt to advance the "spiritual development" of the children by means of traditional prayers and exercises in keeping with the mission of the church? And still, GRSD maintained a policy of not monitoring for religious content!

9. GRSD was unable to control or prevent the printing of Christian School handbooks such as Exhibits 48, 50, 51, 52 which list many of its *Shared Time* teachers on the teaching staff of Millbrook Christian School, Seymour Christian School, and Creston-Mayfield Christian School. (J.A. 442, 443). These teachers, most being previous employees of the Christian School Association, had become

so much a part of the overall atmosphere of the religious schools that their transfer to the public school payroll was not even noted in the annual publication of the booklets. As to such a teacher who was suddenly hired away from Millbrook Christian School by GRSD, then assigned right back to Millbrook to teach the same subject (now a *Shared Time* class) to the same students, what would be the degree of likelihood that religious viewpoints and subject matter would be integrated with academic? This teacher would be familiar with the expressed mission which requires that "in a school which seeks to provide a Christian education it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-pervading force in the educational program". (J.A. 404, 405). And still, there was no monitoring for religious content!

10. GRSD has transferred many administrative duties and functions to persons employed by the religious schools in administrative positions. (J.A. 434-439, paragraphs 118, 120, 122, 123, 130). The Director of the *Shared Time* program testified that the principal of one of the Catholic high schools would be his "first choice" for Community Education Coordinator at that school, indicating a policy decision to place such persons in supervisory positions over public education programs. This is not mere administrative entanglement of the kind which caused this Court to strike down the programs in *Lemon*, *Meek*, and *Wolman*; this goes further and involves a joinder of the public and nonpublic systems at the planning and supervisory levels of administration. When entanglement reaches this level, it becomes proper to inquire whether the church is now operating the public schools, or whether the government has assumed control of church institu-

tions. Either way, the program comes into direct conflict with the pronouncement from *Everson* that "neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa". 330 U.S., at 15.

The above ten-point analysis of the program in issue demonstrates that, contrary to Petitioners' claim, it is not conducted "under conditions of public school control". Neither is it "open to all eligible to attend a public school". Thus, *it lacks two essential ingredients of a public school program.*

Respondents submit that this program was designed to augment the curriculum of the religious schools and to supplement the salaries of teachers and administrators employed by religious schools. In its actual operation it performs those functions, both of which are prohibited by the Establishment Clause.

#### IV.

**If the Shared Time arrangement conducted within church schools is truly a public school program, the district has established a dual system of public schools, one system in which children of all races, religions, and ethnic origins are mixed together in the tradition of American public education, and a second in which children are segregated according to religion.**

At trial Respondents proved by many witnesses and exhibits the pervasive sectarian character of the non-public schools receiving Shared Time services. These schools have high concentrations of children professing the religious affiliation of the school itself. See J.A. 455, paragraphs 177-179. Also, paragraph 60 at J.A. 408. The Grand Rapids Christian School Association operates six schools, including a high school. One of these is Oakdale Elemen-

tary School located in the so-called "inner city" portion of Grand Rapids. The neighborhood is about 75% minority (black), but the student body of the Christian school is only 25% minority. Directly across the street from this Christian school is Alexander Public Elementary School which is about 90% minority, according to testimony of Ronald Boss, Principal of Oakdale Christian School. (J.A. 456).

Exhibit 77 (J.A. 271) spells out the religious doctrine taught in the Christian schools. Exhibit 68 (J.A. 405) is an application for admission to the schools of the Association. It requires the parent either to subscribe to that doctrinal "basis" or agree to have his children taught according to the basic principles. This has the effect of restricting admission to those who will accept the doctrine spelled out in the "basis", and it produces a completely homogeneous student body, based upon the religious principles referred to in the Application for Admission.

This is true, also, of the Catholic schools. (J.A. 455, paragraphs 178, 179). The two Catholic high schools are 96.5% and 98% Catholic in enrollment. Of the 23 Catholic elementary schools receiving Shared Time services, only two were identified as having any significant number of non-Catholic students. (J.A. 121, 394). The Superintendent of the Grand Rapids Catholic Schools testified that, as to twelve inner-city Catholic schools in Grand Rapids, non-Catholics represent 15% of the student body. (J.A. 113). Among the remaining eleven schools, many are more than 95% Catholic. See J.A. 456 as to Sacred Heart School and Immaculate Heart of Mary School.

If these religiously-segregated schools are held to be "public schools" in the sense that GRSD can provide its



educational services to them in the same way it provides services in buildings owned and operated by the District, GRSD will have established a dual system of schools. One system will be free, open to all children, and conducted without discrimination as to race, color, or creed. In the second system, "public school" children will be segregated in the various buildings according to religion; those buildings will be owned and controlled by church organizations which will be able to impose religious restrictions on admission to the student body; and they will be able to require attendance at religious activities and exercises within the building.

In one system students will be drawn from within specified attendance boundaries; in the other system there will be no attendance districts or boundaries, and many children will come from outside the public school district. Even so, without payment of any tuition to GRSD, they will qualify for "public school" services because they are enrolled at the religious school. To the contrary, in the traditional public school program if a child enrolls from a residence outside the boundaries of the public school district, his parents are charged tuition.

In the public schools owned and operated by GRSD, a voluntary student Bible study club would not be permitted to meet and conduct its activities on the school campus during the school day. *Johnson v. Huntington Beach Union High School District*, 68 Cal. App. 3d 1 (1977), 137 Cal. Rptr. 43, *cert denied* 434 U.S. 877. Nor could there be organized, school-sponsored prayer or Bible reading. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, *supra*. However, these activities would be permitted without restriction in the Shared Time "public school" system.

Since such a shocking result would make a fool of the law, a decision here in favor of Petitioners must necessarily involve overruling *Huntington Beach*, *Engel* and *Schempp*, *supra*. Justice Douglas addressed this dilemma in concurring in *Lemon*:

"Under these laws there will be vast governmental suppression, surveillance, or meddling in church affairs. . . . school prayers, the daily routine of parochial schools, must go if our decision in *Engel v. Vitale*, 370 U.S. 421, is honored. If it is not honored, then the state has established a religious sect." 403 U.S., at 634.

Another case which must fall with the others is *Tudor v. Board of Education of Rutherford*, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied* sub nom, *Gideons International v. Tudor*, 348 U.S. 816 (1954), which held that the Establishment Clause prohibits public school participation in the distribution of Gideon Bibles. Clearly, we could not countenance a rule which permits organized distribution of Bibles and other religious materials in Shared Time "public schools" of the district, while at the same time prohibiting such distribution in the traditional public schools of the same district. Likewise, as to the posting of the Ten Commandments in public schools. *Stone v. Graham*, 449 U.S. 39 (1980).

In the continuing future development of this Shared Time concept (or, *reverse* Shared Time, as Respondents term it), if the public school district can, consistently with the Establishment Clause, provide classes in reading, math, art, music, and physical education, what strictures of the Establishment Clause prevent broadening that list to include English, English Literature, Chemistry, and Physics? Clearly, there is no logical place to stop once the district commences supplying any "secular" courses.

Stated another way, if this Shared Time "public school" program passes muster because the classes are "supplementary" or "remedial" or "enrichment", as distinguished from courses in the "core curriculum", each time GRSD adds another such "supplementary" class or takes over such a class already existing in the curriculum of a religious school, it may become necessary for the United States Supreme Court to decide whether GRSD has finally overstepped the hazy line between insignificant governmental accommodation to religion and direct financial aid to the religious institution. Such a fine distinction would breed an avalanche of litigation.

This discussion exemplifies the proposition that when the *principle* of separation is violated, even in a modest, seemingly benign way, the resulting accommodation to sectarian pressures forms the platform for the next, more-intrusive assault upon the principle. Madison warned against this:

"The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle." *Remonstrance*, paragraph 3.

If this Shared Time program gains Court approval, how could other religious groups resist the temptation to provide day schools for children of their adherents, with the government picking up the tab for many or most of the "secular" courses. Almost certainly, we would see a proliferation of religious schools which would siphon off Methodists, Baptists, Presbyterians, Moslems, Mohamedans, Hindus. In the final stages, those remaining in the public

schools would be the poor, who were without any financial resources to pay the now-diminished tuition at the state-subsidized religious schools, and the unchurched. We would have completed the transition back to a religiously-segregated society similar to that of Northern Ireland where both Catholic and Protestant schools are subsidized by the government. Such a system effectively produces total segregation from the cradle to the grave.

The genius of our nation has been our system of free, public schools. With over 200 recognized religions and denominations of religion, we have nevertheless been able to avoid sectarian strife and competition by the process of educating our young people in an atmosphere of blended racial and religious cultures, with none given any governmental sponsorship or other advantage over the others. The "public school" Shared Time Program involved in this case departs from that American tradition by offering a strong financial advantage and subsidy to any church organization which presently has in place a system of religious day schools. However, if the program is approved by this Court, other church groups which do not presently operate day schools would likely open new schools in order to take advantage of this program of significant government aid to religion.

Since most of these groups would be identified with the Christian religion, at what point along this road would it be acknowledged that the government had "established" the Christian religion? Again, in the words of Madison:

"... it is proper to take alarm at the first experiment on our liberties. . . . who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of



all other sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" *Remonstrance*, paragraph 3.

The first step along that road is the one most to be feared, as it countenances and encourages the next and all successive steps, until at last the principle is destroyed and the freedom lost.

The discussion thus far has pertained to dual public school systems in which one of the companion systems is segregated according to *religion*. Consider for a moment the argument made by Justice Douglas at page 632 of his concurring Opinion in *Lemon v. Kurtzman*, *supra*. He said:

"Where the governmental activity is the financing of the private school, the various limitations or restraints imposed by the Constitution on state governments come into play. Thus Arkansas as part of its attempt to avoid the consequences of *Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294, withdrew its financial support from some public schools and sent the funds instead to private schools. That state action was held to violate the Equal Protection Clause. *Aaron v. McKinley*, 173 F. Supp. 944, 952. We affirmed *sub nom. Fabus v. Aaron*, 361 U.S. 197."

We know from the experience of a long line of school desegregation cases that there are individuals and groups in our society who would bring about total segregation of public education according to race if they could find support for that doctrine in the U. S. Constitution. This Shared Time Program, if approved by this Court, would be the perfect vehicle to accomplish that heretofore forbidden objective. If segregationists could gain control of a public school board, as they did in Arkansas in the case

cited by Justice Douglas, they could enter into leases with existing or newly-formed sectarian schools, then commence providing "Shared Time" public school classes to those schools, gradually enlarging the curriculum until a total program of "secular" education was available in those buildings. Most certainly, this would stimulate enrollments in these "public schools". Tuition charges would be modest because the public school district would be picking up the cost of virtually all classes. And, as in the instant case, courses offered at the sites of the religious schools would be identical to those offered in the regular public schools of the district, so the program would merely be an effort by the School District to satisfy "the secular educational needs of all school age children." (Petitioners' Brief, page 42 et seq.).

As additional students were encouraged to transfer into these new "public schools", the District would have established a dual system of public schools, one being the traditional system now enrolling the poor, black, and unchurched, and a second "Shared Time" public school system enrolling mostly white children of middle class parents who could afford the modest tuition.

The racial profile of GRSD, set forth in *Higgins v. Board of Education of the City of Grand Rapids*, 508 F2d 779 (1974), suggests that such an occurrence is possible in Grand Rapids:

"Grand Rapids is a city lying in the southwest portion of Michigan having a 1970 population of 197,649. It is the county seat of Kent County with a population of 411,044. The Grand Rapids School District is generally coterminous with the city of Grand Rapids. "The racial composition of the Grand Rapids population has changed materially in recent years, growing from a 1% black population in 1940 to 11.3% in 1970.



In the twenty years from 1950 to 1970 the black population tripled, with the vast majority concentrating within an area that began in and expanded from what is generally referred to as the central city.

"Historically, the Grand Rapids school population has reflected a higher percentage of blacks than that found in the total population of the city. Thus, the non-white school population grew from 2.58% in 1941-42, to 6.52% in 1950-51, to 9.80% in 1954-55, to 15.20% in 1960-61, and to 21.24% in 1968-69. Finally in 1972-73 the black enrollment was 8,459 out of 32,864, representing a percentage of 25.74%. At the elementary level where the black population is greater as a result of recent birth rates the percentage of non-white enrollment increased from 7.2% in 1950 to 18% in 1960 and to 31.2% in 1972. As the district judge assessed these statistics, non-white enrollment in elementary schools increased 351% from 1950 to 1965 and increased another 31.7% from 1965 to 1970. White enrollment increased only 38% from 1950 to 1965. It actually decreased 9% from 1965 to 1970.

"By 1965, 97% of the total non-white elementary school population in Grand Rapids was in attendance at the 11 inner-city schools whose non-white enrollment averaged 83%. By 1970, the percentage of black elementary school children attending these inner-city schools was down from 97% to 85% but by then these schools were on the average 89% black. The figures continued to shift until at the time of trial only 65% of all non-white students were attending the inner-city schools then having an average enrollment of 95% black students." 508 F2d, at 784.

In the instant case, the Court of Appeals considered this aspect in its Opinion at 40A:

"We recognize, of course, the increasing impact of Supreme Court majority approval of public funding for religiously neutral supplies and services which are provided to all schools, including parochial schools. If, however, what has been adopted by the Grand

Rapids School Board were to be added to the list of such approvals, the separation of church and state will be effectively ended in the field of public education. Legislatures in many states are notoriously vulnerable to pressures from religious constituencies. Under such pressure legislatures can be expected to allocate increasing Shared Time or Community Development funds to the point where the great majority of parochial school costs will be carried by taxpayers. The only costs not covered may in time be those specifically allocated to religious services or classes in religious instruction. Constant secular inspection and surveillance of all activities not specifically labeled religious would be required to maintain even a fiction of separation. *Such a result would end public education as a major aspect of the American goal of equality of opportunity.*" 718 F2d, at 1406. (Emphasis added).

GRSD has claimed that it extended these services into sectarian schools in keeping with a policy to provide educational services to the entire community. However, the Michigan Constitution contemplates a less intrusive approach to the attainment of that goal:

"The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color, or national origin." Art. VIII, Sec. 2, Michigan Constitution of 1963.

Under this provision, the state government is required to set up a system of free public schools; however, neither the state nor any local public school board is required or expected to roam the length and breadth of that district in search of students whose parents have rejected public education and, finding them enrolled in sectarian schools, impose educational services upon those schools

under the guise of "providing educational opportunity for the total community". By Petitioners' admission, these services are already available in the public schools owned and operated by GRSD, and any students who desire the services can acquire them there. To, instead, make use of sectarian institutions to further goals in secular education does violence to the principle that "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice". *Abington School District v. Schempp*, 374 U.S. 203, 265 (1963).

Petitioners, at page 4 of their Brief, footnote 6, have reported to this Court an interesting development which occurred since the case was accepted for review. On March 7, 1984, one of the named Petitioners, State Board of Education of the State of Michigan, by formal resolution renounced its further participation in this case, saying that the Shared Time arrangement violates both the Michigan Constitution and the Establishment Clause of the First Amendment to the United States Constitution. Respondents surmise that this may be a belated recognition by that body of the destructive potential of this Shared Time concept, as argued above in this section of Respondents' Brief.

The action taken March 7, 1984 also raises a question of possible mootness of this case. Contrary to the assertion of Petitioners that "the State Board of Education does not have the authority to terminate the continued operation of the programs at issue here", Respondents believe it clearly *does* have that authority under Article VIII, Section 3, of the Michigan Constitution:

"State board of education; duties. Sec. 3. Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith."

See, also, *Welling v. Livonia Board of Education*, 382 Mich 620, 171 NW2d 545 (1969).

Thus, it seems likely that Shared Time programs conducted at religious schools will be terminated in Michigan regardless of the outcome of this case.

## V.

**The individual plaintiffs (respondents herein) have standing to attack these educational programs under the establishment clause of the First Amendment.**

The Courts below considered this issue at 3a and 67a-70a, finding that the individual Plaintiffs (Respondents here) possess requisite standing under *Flast v. Cohen*, 392 U.S. 83 (1968).

Argument of this issue will be made by Americans United for Separation of Church and State, as AMICUS CURIAE supporting Respondents.

**VI.**

**CONCLUSION AND RELIEF SOUGHT**

The Judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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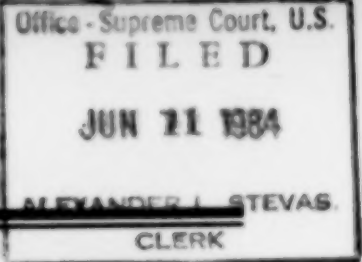
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Dated: June 8, 1984



10  
No.83-990



**IN THE**  
**Supreme Court of the United States**  
**October Term, 1983**

THE SCHOOL DISTRICT OF THE CITY OF GRAND  
RAPIDS; PHILLIP RUNKEL, Superintendent of Public  
Instruction of the State of Michigan; STATE BOARD OF  
EDUCATION OF THE STATE OF MICHIGAN; LOREN  
E. MONROE, State Treasurer of the State of Michigan;  
IRMA GARCIA-AGUILAR and SIMON AGUILAR,  
BRUCE and LINDA BYLSMA, ROBERT and PENELOPE  
COMER, CLARENCE and ROSALEE COVERT, SCIPUO  
and JANICE FLOWERS, JOHN and SHIRLEY LEETSMA,  
*Petitioners,*

v.

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS;  
PATRICIA DAVIS; FREDERICK L. SCHWASS and  
WALTER BERGMAN,  
*Respondents.*

On Writ of Certiorari to  
The United States Court of Appeals  
for the Sixth Circuit

**BRIEF OF AMERICANS UNITED FOR SEPARATION  
OF CHURCH AND STATE AS AMICUS CURIAE**

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IN THE  
**Supreme Court of the United States**  
October Term, 1983

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No. 83-990

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COMER, CLARENCE and ROSALEE COVERT, SCIPUO  
and JANICE FLOWERS, JOHN and SHIRLEY LEETSMA,  
*Petitioners,*

v.

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS;  
PATRICIA DAVIS; FREDERICK L. SCHWASS and  
WALTER BERGMAN,  
*Respondents.*

---

On Writ of Certiorari to  
The United States Court of Appeals  
for the Sixth Circuit

---

**BRIEF OF AMERICANS UNITED FOR SEPARATION  
OF CHURCH AND STATE AS AMICUS CURIAE**

---

Americans United for Separation of Church and State is  
a nonprofit corporation formed to maintain and advance  
civil and religious liberties through the enforcement of the  
rights and privileges granted by the First and Fourteenth  
Amendments to the Constitution of the United States.

Americans United has a membership of some 40 thousand members of various religious beliefs and some of no religious belief in all states of the United States, including the State of Michigan. Americans United is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United for Separation of Church and State has been involved in almost every major case coming before this Court dealing with the question of the Establishment Clause of the First Amendment to the United States Constitution, including such cases as *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); and *Meek v. Pittenger*, 421 U.S. 349 (1975).

Americans United is particularly interested in the issues raised in this case because the decision in this case may directly affect two cases in which Americans United is currently involved. Those cases are *Wamble v. Bell*, United States District Court, Western District of Missouri, Western Division, Civil Action No. 77-0254-CV-W-8, which is presently awaiting a decision on the merits; and *Barnes v. Bell*, United States District Court for the Western District of Kentucky at Louisville, Civil Action No. C-80-0501-L(B). Both of these cases involve challenges under the Establishment Clause of the First Amendment to Title I of the Elementary and Secondary Education Act of 1965.

Americans United agrees with the position expressed in the brief for the United States as *amicus curiae* that this case does not itself involve any program funded under Title I but that "this case will unavoidably carry implications for judicial treatment of pending Title I suits." (Amicus Brief for the United States, p. 27).

Because there are pending cases under Title I, ESEA, the Court should carefully limit its ruling in this case and leave to another day those independent issues presented in cases where "the First Amendment implications may vary [from this case] according to the precise contours of the plan that is formulated" under Title I. *Wheeler v. Barrera*, 417 U.S. 402, 426 (1974).

Americans United also has a particular interest in the question of standing as raised by petitioners by reason of its participation in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). In the event individual state taxpayers are not permitted to challenge unconstitutional acts under the Establishment Clause committed by state government and their agencies, the Establishment Clause will soon become meaningless.

Americans United was also a plaintiff in the instant action but was dismissed as a party plaintiff on August 16, 1982, (J.A. 37).

Americans United will contend in this brief that the individual respondents, as state and local taxpayers, have standing, notwithstanding *Frothingham v. Mellon*, 262 U.S. 447 (1923), but also have standing under the reasoning of *Flast v. Cohen*, 392 U.S. 83 (1968). It will also contend that the providing of educational services by public school teachers on the premises of church-operated schools is unconstitutional under this Court's holding in *Meek v. Pittenger*, 421 U.S. 349 (1975).

## SUMMARY OF ARGUMENT

Respondents are state and school district taxpayers asserting that actions of state government and its instru-



mentalities have violated the Establishment Clause of the First Amendment. Under the prior decisions of this Court, local taxpayers have standing to bring an action if the challenge goes to spending. The restrictions enunciated in *Frothingham v. Mellon*, *supra*, and the holding of this Court in *Valley Forge Christian College v. Americans United for Separation of Church and State*, *supra*, are therefore not relevant.

Even if an action brought by state or local taxpayers against a state or local school district program is governed by the same rules as a federal taxpayer action, these respondents still meet the standing requirements as set forth in *Flast v. Cohen*, *supra*.

The "shared time" program challenged herein must be found unconstitutional if the principles set forth in *Meek v. Pittenger*, *supra*, are faithfully applied. This Court has invalidated similar programs where teachers paid by tax funds provide educational services on the premises of sectarian schools.

## ARGUMENT

### I.

#### **RESPONDENTS, WHO ARE STATE AND SCHOOL DISTRICT TAXPAYERS, HAVE STANDING TO CHALLENGE THE ACTIONS OF STATE GOVERNMENT AND THEIR AGENCIES UNDER THE ESTABLISHMENT CLAUSE.**

Petitioners contend that respondents do not have standing to bring this action predicated on their contention on this Court's determination in *Flast v. Cohen*, 392 U.S. 83 (1968), and *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464

(1982). The simple answer is that neither *Flast* nor *Valley Forge* is controlling.

The respondents alleged in the complaint, and corroborated by affidavits received as part of the record, that they are citizens of the United States and residents of the Grand Rapids School District who pay federal, state, and local taxes, and that they object on the basis of the Establishment Clause to the use of their state, and local taxes to support the programs challenged in this case.

Unlike the plaintiffs in *Flast* and *Valley Forge*, this is not an action based upon federal taxpayer status seeking to invalidate a federal statute. The decision in *Flast v. Cohen*, *supra*, addressed the standing issue as a result of the Court's prior decision in *Frothingham v. Mellon*, 262 U.S. 447 (1923). In *Frothingham* the Court, for the first time, "ruled that a *federal taxpayer* is without standing to challenge the constitutionality of a *federal statute*." *Flast v. Cohen*, *supra* at 85 (emphasis supplied). This Court in *Valley Forge* acknowledged that the ruling in *Flast* is an "exception to the *Frothingham* principle," *Valley Forge Christian College v. Americans United*, *supra* at 481.

It is clear that the *Frothingham* limitation applies only to federal taxpayers challenging a federal statute. The Court in *Frothingham* specifically noted "the interest of a taxpayer of a municipality in the application of its moneys is direct and immediate, and the remedy by injunction to present the misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court." *Frothingham v. Mellon*, *supra* at 486.

Justice Brennan, in his dissenting opinion in *Valley Forge Christian College v. Americans United for Separation of Church and State*, *supra* at 495, noted that "[t]he

Court conceded that it had historically treated the interest of a *municipal* taxpayer in the application of the municipality's funds as sufficiently direct and immediate to warrant injunctive relief to prevent misuse." See also Davis, "Standing to Challenge Governmental Action," 39 Minn. L. Rev. 353, 386-391 (1955); "Standing: *Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 610-611 (1968).

In *Bradfield v. Roberts*, 175 U.S. 291 (1899), this Court passed upon the merits of the constitutional question raised by "a citizen and taxpayer of the United States and a resident of the District of Columbia." The suit purposed to enjoin the Treasurer of the United States from making a disbursement to a District of Columbia hospital, and argued that the legislation authorizing the disbursement was unconstitutional. The defendant demurred in the lower court on the ground that the complaint had shown no right to maintain the bill. This Court, however, decided the merits of the constitutional issue. Justice Brennan, in *Valley Forge*, noted that "the Court permitted a federal taxpayer to present an Establishment Clause challenge to the use of federal money for the construction of hospital buildings in the District of Columbia . . . because it was appropriate to treat the District of Columbia as a municipality." *Valley Forge Christian College v. Americans United for Separation of Church and State*, *supra* at 495.

Subsequent to the Court's decision in *Frothingham*, this Court in *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), affirmed the decision of the Louisiana Supreme Court which had in turn affirmed the judgment of the state trial court refusing to grant an injunction at the request of "citizens and tax-payers of the State of Louisiana." In *Cochran* plaintiffs sought to restrain the state board of education and other state officials from ex-

panding any part of the severance tax fund in purchasing school books. This action was not based upon the First Amendment, but rather was brought under the Fourteenth Amendment claiming that the furnishing of textbooks "to aid private, religious, sectarian, and other schools not embraced in the public educational system of the state," constituted a taking of private property for a private purpose. The court reviewed the appeal on the merits unconcerned about any standing question.

In *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court had the opportunity to apply the *Frothingham* stricture to a case where the plaintiffs claimed standing by reason of their district taxpayers' status. The suit was filed in state court and challenged the right of the local board of education to reimburse parents of parochial school students for bus transportation expenses incurred in sending their children to parochial schools.

This Court, however, reached the establishment issue without concern for the plaintiffs' standing. It did so without any inquiry into the extent of the taxpayers' interests, yet this Court said later that *Everson* had suffered "a direct dollar-and-cent injury." *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952). As stated by Justice Jackson "in the *Everson* case there was a direct, substantial and measurable burden on the complainant as a taxpayer to raise funds that were used to subsidize transportation to parochial schools. Hence, we had jurisdiction to examine the constitutionality of the levy and protect against it if a majority had agreed that the subsidy for transportation was unconstitutional." *McCullum v. Board of Education*, 333 U.S. 203, 233 (1948) (Jackson, J., concurring).

Conversely, in *Doremus v. Board of Education*, *supra*, three years after its decision in *Everson*, this Court



dismissed the appeal for lack of standing. In *Doremus*, the taxpayers sought to challenge Bible reading in New Jersey schools, and the Court held that they lacked standing. The difference, according to the *Doremus* opinion, was:

Because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor is the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants establish the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct.

*Id.* at 434-35.

As Professor Davis noted "[s]o a state taxpayer, according to the Supreme Court in *Everson* and *Doremus*, has standing to challenge a spending program but not a Bible-reading program not involving spending. The test is whether the taxpayer's action is 'a good-faith pocketbook action,' and the test is met when the challenge goes to spending, for then the taxpayer sustains 'a direct dollars-and-cents injury.'" Davis, "Standing: Taxpayers and Others," *supra* at 611.

Petitioners contend that respondents were not injured because, in the trial on the merits, respondents did not quantify the extent of their injury. Under the holding of *Flast*, plaintiffs are not required to quantify the extent of the injury.

As Justice Harlan noted in his dissent in *Flast*:

The complaint in this case, unlike that in *Frothingham*, contains no allegation that the contested expenditures will in any fashion affect the amount of these taxpayers' own existing or foreseeable tax obligations. Even in cases in which such an allegation is made, the suit cannot result in an adjudication either of the plaintiff's tax liabilities or of the propriety of any particular level of taxation. The relief available to such a plaintiff consists entirely of the vindication of rights held in common by all citizens. It is thus scarcely surprising that few of the state courts that permit such suits require proof either that the challenged expenditure is consequential an amount or that it is likely to affect significantly the plaintiff's own tax bills; these courts have at least impliedly recognized that such allegations are surplusage, useful only to preserve the form of an obvious fiction.

*Flast v. Cohen, supra* at 118 (Harlan, J. dissenting).

Nowhere in the *Flast* opinion is there any attempt to quantify the dollar-and-cent injury suffered by plaintiffs in that case.

It is noteworthy that petitioners failed to file a summary judgment motion contesting respondents' standing. If respondent's allegations of injury were in fact untrue, then the petitioners "should have moved for summary judgment."



ment on the standing issue and demonstrated to the district court that the allegations were a sham and raised no genuine issue of fact." *United States v. SCRAP*, 412 U.S. 669, 690 (1973).

In paragraph 25 of their complaint respondents claim that the acts and threatened acts of the defendants required them "to pay taxes for the support of religion and religious schools, to aid with public funds religion and the establishment of religion, and to give financial aid to the teaching and dissemination of religious doctrines and beliefs." (J.A. 8-9).

The allegations contained in respondents' complaint therefore are almost identical to the allegations contained in the *Flast* complaint which this Court determined was adequate to confer standing. "The gravamen of the appellants' complaint [in *Flast*] was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools. Such expenditures were alleged to be in contravention of the Establishment and Free Exercise Clauses of the First Amendment." *Flast v. Cohen, supra* at 85-86.

Thus, even if the *Frothingham* restriction for federal taxpayers' actions apply to a state or school district taxpayers' complaint, respondents are within the *Flast* exception to *Frothingham*.

There is no discernible distinction between the claim filed by respondents in the instant action and the plaintiffs in *Flast*. In *Flast* appellants filed suit in the United States District Court for the Southern District of New York "to enjoin the allegedly unconstitutional expenditure of fed-

eral funds under Titles I and II of the Elementary and Secondary Education Act of 1965 . . . . The complaint alleged that the seven appellants had as a common attribute that 'each pay[s] income taxes of the United States,' and it is clear from the complaint that the appellants were resting their standing to maintain the action solely on their status as federal taxpayers. The appellees, who are charged by Congress with administering the Elementary and Secondary Education Act of 1965, were used in their official capacities." *Id.* at 85.

Clearly, this Court found injury in fact in *Flast* not by reason of any proven quantification of his dollar-and-cent injury, for such a determination is completely absent from the opinion in *Flast*. What is apparent is that the Court therein determined that plaintiffs had standing because the plaintiffs had "'alleged such a personal stake in the outcome of the controversy as to assure concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Id.* at 99.

One commentator, in computing the possible dollar-and-cent injury in *Flast*, determined that one who pays federal taxes of \$1,000 would have been hurt to the extent of approximately \$.12 by the alleged illegality of the program under attack there. See Davis, "Standing: Taxpayers and Others," *supra* at 611.

However, we do not know whether any of the plaintiffs in *Flast* suffered even to that extent. Other cases decided by this Court illustrate that the claimed injury need not be substantial. In *McGowan v. Maryland*, 366 U.S. 420 (1961), each party's stake was a fine of \$5.00 in costs. In *Baker v. Carr*, 396 U.S. 186 (1962), a formal stake was a

fraction of one vote. In *Harper v. Virginia Board of Education*, 383 U.S. 663 (1966), plaintiff's interest was a poll tax of \$1.50.

In this case respondents have alleged two levels of taxpayer injury — as state taxpayers and as school district taxpayers.

The Shared Time and before and after Community Education classes involving parochial school students resulted in state aid payments to the Grand Rapids Public School District of approximately \$6 million in fiscal 1981-82. This is \$6 million of state funds which would otherwise not have been spent.

As school district taxpayers, the Grand Rapids public schools appropriate approximately \$200,000 per year to the parochial schools in order to "lease" the space for the administration of the program to benefit parochial school students on the premises of the parochial schools. (J.A. 426-427). The amount is computed on the basis of \$10 per class per week in secondary schools and \$6 per class per week in elementary schools. The total cost of the program as operated in the school year 1981-82 was about \$3 million. According to interrogatories answered by an officer of the Grand Rapids School District, the district received its operating funds for 1979-80 from the following sources: local revenue - 39.8%; state revenue - 51.9%; tuition - 5.1%; interest - 2.5%; other revenue - .7%. The state's portion has been diminishing in the past few years, especially that part which comes from the general fund contribution to education (J.A. 289). This contribution is part of the state budget and must be annually appropriated by the legislature.

Petitioners make the claim that the local district actually received more state funds for every part-time public school

student than was necessary to conduct the programs at issue (74a n.6 (J.A. ¶238) 354) and thus the difference eased the overall burden of the local taxpayer. Nevertheless, to the extent that local and state tax funds were spent to provide services for parochial school students on the premises of the parochial schools, tax funds were used.

Petitioners contend that the action challenged by respondents is not an exercise of taxing and spending power by the Michigan legislature but a decision by local authorities to implement the programs at issue by the use of the funds made available by the state legislature (Joint Brief of Petitioners, p. 46).

Paragraph 10 of respondents' complaint (J.A. 5) alleges that the school district is a subdivision of the government of the State of Michigan deriving its funds from the taxpayers. Paragraph 19 of the complaint (J.A. 7) states that the superintendent of public instruction of the State of Michigan and State Board of Education have approved said

shared time for purposes of receiving State taxpayer aid. Likewise, defendant Loren E. Monroe has paid state tax funds to defendant school district for said program. Unless enjoined from so doing, said defendant will continue to authorize payment of tax funds, and will pay same, to defendant school district for said program which is in violation of the Establishment Clause of the First Amendment.

(J.A. 7, ¶19).

Paragraph 20 (J.A. 20) alleges that the funds from which state school aid is derived are general tax revenue of the State of Michigan, including income taxes and sales



taxes paid by the individual plaintiffs and others similarly situated. In the answer filed by the Superintendent of Public Instruction, State Board of Education, and the State Treasurer, it was admitted that the allegations contained in paragraph 10 were true (J.A. 10). Petitioners also admitted that the allegations contained in paragraph 19 of the complaint were correct and further asserted that they have a duty to approve and make the payments of state aid funds to the defendant school district for public school pupils in part-time attendance in public school premises leased by the school district from nonpublic schools. They also admit the allegations contained in paragraph 20 (J.A. 21).

Under Article X, §17 of the Michigan Constitution of 1963, "no money shall be paid out of the State Treasury except in pursuance of appropriations made by law." Petitioners imply that once the state aid is paid out, the state's involvement in the alleged unconstitutional action is at an end. In essence, petitioners suggest that a bifurcation of the appropriation from the spending aspect should deny respondents' standing. Under petitioners' theory, apparently if the state made both the appropriation and the spending determination, respondents would have standing under *Flast*. Petitioners, however, misconceive the responsibilities of the state, the knowledge of the state officials, and the relationship of the school district to the state defendants.

The status of school districts under Michigan law is set forth in *Bradley v. Milliken*, 484 F.2d 215, 245-249 (6th Cir. 1973). There, the court noted:

As held by the district court, it is well established under the Constitution and laws of Michigan that the public school system is a state function

and that local school districts are instrumentalities of the state created for administrative convenience.

*Id.* at 245.

The legislature has entire control over the schools of the state subject only to the provisions of the Constitution. *Child Welfare Society of Flint v. Kennedy School District*, 220 Mich. 290 (1922). It is state policy to retain control of its school system to be administered throughout the state under state laws by local state agencies organized with plenary powers to carry out delegated functions given it by the legislature. *School District of the City of Lansing v. State Board of Education*, 367 Mich. 591 (1962). Even though the power of daily administration of public schools has been delegated to officials with less than statewide jurisdiction, this does not relieve the state officials of their obligation to use their authority in accordance with the Constitution. *Bradley v. Milliken*, 338 F.Supp. 582, 593-594 (E.D. Mich. 1971).

The State Board of Education has superintending control over local boards of education and superintending control over all education, elementary and secondary. *Oliver v. Kalamazoo Board of Education*, 346 F.Supp. 766, 778 (W.D. Mich. 1972). As the court stated in *Oliver*, citing the court in *Davis v. School District of Pontiac*, 309 F.Supp. 734, 741-742 (E.D. Mich. 1970) "when the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance such situation. Sins of omission can be as serious as sins of commission."

Clearly, the state department of education was aware of the fact that when they transmitted moneys to the school



district of the City of Grand Rapids, the payment of state aid funds to the school district would be used to provide services to parochial school students on the premises of parochial schools and that the Michigan statute does not prohibit such expenditure (1976 P.A. 451 §1282; MCLA 380.1282; MSA 15.41282). See paragraph 19 of petitioners' answer (J.A. 29, ¶19) and excerpts from Robert Hornberger of the Michigan Department of Education (J.A. 152-153, ¶2).

Under the Establishment Clause of the First Amendment, in order for funds or services granted by the state not to have the impermissible effect of advancing religion, the state must ensure that the effects of such grant will not permit its being put to religious use. The state also has the continuing responsibility to ascertain that the state aid is not subsequently put to religious use. *Americans United for Separation of Church and State v. Oakey*, 339 F.Supp. 545, 549 (D. Vt. 1972). See also *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The above indicates that the taxing and spending allegations of the respondents here are no different than those contained in the *Flast* complaint. In *Flast*, the defendants are those "charged by Congress with administering the Elementary and Secondary Education Act of 1965." *Flast*, *supra* at 85. This Court noted in *Flast*:

While disclaiming any intent to challenge as unconstitutional all programs under Title I of the Act, the complaint alleges that federal funds have been disbursed under the Act, "with the consent and approval of the [appellees]," and that such funds have been used and will continue to be used to finance "instruction in reading,

arithmetic and other subjects and for guidance in religious and sectarian schools" and the "purchase of textbooks and instructional library materials for use in religious and sectarian schools." *Id.* at 87.

Unlike *Flast*, respondents in the instant action have one additional level of taxpayers' status. Not only are they state taxpayers, they are also school district taxpayers. Money is transmitted by the state to the local school district. Part of the funds also come from local school district taxes. The action of the local school board determines the specific expenditure of funds. The Establishment Clause of the First Amendment made applicable to the states by the Fourteenth Amendment to the United States Constitution is equally applicable to action by a school district board of education. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1942). In any event, respondents' standing is not lost because the school board makes the ultimate determination as to the expenditure of funds since a school district is merely an instrumentality of the state created for administrative convenience. *Bradley v. Milliken*, 44 F.2d 215, 245 (6th Cir. 1973).

Petitioners make the point that respondents do not appear as parents of children involved in the challenged programs. However, the same was true in *Flast*. There, plaintiffs were neither school children nor parents of school children.

It is respectfully submitted that the parties which sought to invoke the Court's jurisdiction in this case did "allege such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely

depends for illumination of difficult constitutional questions." *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). Respondents, as both state and local district taxpayers, have in this case also met the requirement of a "personal stake" which, under the decisional law of this Court, must consist of "a distinct and palpable injury. . ." to the plaintiff. *Duke Power Co.*, *supra* at 72, quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975) and "a 'fairly tracable' causal connection between the claimed injury and the challenged conduct," *Duke Power*, *supra* at 72, quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977).

The determination of a plaintiff's standing under *Flast* consists of an evaluation by the court of the nexus between the plaintiff and the cause of action, *Flast v. Cohen*, *supra*, so that it may determine whether the party seeking relief has alleged a personal stake in the resolution of the controversy. *Flast* made it clear that a taxpayer may be a proper party to request adjudication of an issue, so long as he establishes "a logical link between that status and the type of legislative enactment challenged." *Id.* at 102. While incidental expenditures arising from administration of regulatory legislation are sufficient, if a funding program is challenged, as is true in the case at hand, only one further element must be established to demonstrate a taxpayer's standing:

Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limits imposed upon the exercise of the

congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8.

*Id.* at 102-103.

In *Flast* the precise nature of the constitutional infringement was a violation of the Establishment Clause of the First Amendment as is the case here. Thus, the respondents have standing to challenge this school district operated (and local and state funded) program because they allege it infringes on the specific prohibition against the establishment of religion contained in the First Amendment to the Constitution, applied to the states through the Due Process Clause of the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Gitlow v. New York*, 268 U.S. 652 (1925).

Respondents' First Amendment allegations contained in their complaint concern one of the two religion clauses — the Establishment Clause, which they have clearly stated in the complaint and affidavits. Thus, respondents have established the identical nexus which existed in *Flast* between the individual plaintiffs and the cause of action. The local school district has budgeted expense for lease payments, for teachers' salaries, and other expenses of the Shared Time program and has annually appropriated funds to cover these budgeted expenses. Likewise, the Michigan legislature has authorized local school districts under MSA 15.41282; MCLA 380.1282 to undertake Shared Time programs and has authorized the payment of state school aid funds to local school districts for part-time public school pupils receiving Shared Time instruction on leased premises. MCLA 388.1601 *et seq.*; MSA 15.1919 (901) *et seq.* Also MCLA 380.331; MSA 15.4331.

The Michigan legislature has annually appropriated funds to cover applications made by individual school dis-



tricts for state school aid. All of the requirements of *Flast* are met, as the actions of the state government and its subdivision are clearly an exercise of the taxing and spending power. The limitation asserted by respondents upon that taxing and spending power is the specific constitutional limitation imposed by the Establishment Clause of the First Amendment.

Finally, it might be observed that respondents are not "roam[ing] the country in search of governmental wrongdoing." *Valley Forge Christian College v. Americans United for Separation of Church and State*, *supra* at 487. Rather, respondents are state and local taxpayers residing within the school district in which the alleged constitutional violations are occurring. If they do not have standing, who does?

Recently this Court decided an important establishment case on its merits without finding lack of jurisdiction on the basis of standing. In *Lynch v. Donnelly*, 104 S.Ct. 1355 (March 5, 1984), the Court went right to the heart of the constitutional issues raised in that action.

When that case was before the district court, the defendants challenged the standing of the plaintiffs. The district court, however, turned aside the standing challenge, finding that the plaintiffs did in fact have standing. In doing so it noted "even before *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), recognized the standing of federal taxpayers to challenge governmental expenditures on Establishment Clause grounds, municipal taxpayer standing had been permitted in this area . . . (citations omitted). Thus, there is little doubt that Kriebel, Goodwin and Frazier who pay taxes to Pawtucket, can challenge the city's maintenance of the creche." *Donnelly v. Lynch*, 525 F.Supp. 1150, 1162 (D. R.I. 1981).

A footnote to the district court's opinion, which is similar to the record in this case, indicates that "these plaintiffs submitted affidavits stating that they are now and have been during the time period relevant in this suit taxpaying residents of Pawtucket." Plaintiffs who are state and local taxpayers residing in the affected school district, therefore, have alleged in their complaint sufficient allegations to meet the standing requirements of this Court.

## II.

### **THE "SHARED TIME" EDUCATIONAL PROGRAM PROVIDED BY A PUBLIC SCHOOL DISTRICT FOR STUDENTS ENROLLED IN CHURCH SCHOOLS AND OPERATING ON THE CHURCH SCHOOL PREMISES USING TEACHERS PAID BY TAX MONEY IS UNCONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE.**

The location of the site for the administration of the program here under attack requires that the program be found to be unconstitutional under the Establishment Clause of the First Amendment made applicable to the states and to their political subdivisions by reason of the Fourteenth Amendment.

This Court in *Lynch v. Donnelly*, *supra*, reaffirmed by name many of its prior decisions, including *Lemon v. Kurtzman*, *supra*; *McCullum v. Board of Education*, *supra*; *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975). These decisions, if followed, require this Court to affirm the decisions below.

This Court in *Lynch* discussed the Court's previous differentiation between the on-premises, shared-time pro-



gram found unconstitutional in *McCullum v. Board of Education*, *supra*, and the off-premises, released-time program in *Zorach v. Clauson*, 343 U.S. 306 (1952). *Id.* at 1363-1364. Thus, the site of a given program still has constitutional relevance. See *Wolman v. Walter*, 433 U.S. 229, 242-248 (1977).

Perhaps most significantly, as it relates to the instant case, this Court in *Lynch* found that there was no administrative entanglement between religion and state. *Id.* at 1364. In *Lynch*, the Court specifically found "there is nothing here, of course, like the 'comprehensive, discriminating, and continuing state surveillance' or the 'enduring entanglement' present in *Lemon*." *Id.* at 1364. The facts in the instant case demonstrate that under the decisional law of this Court such monitoring is required.

Relevant is the concurring opinion of Justice O'Connor in *Lynch v. Donnelly*, *supra*, wherein the importance of the entanglement prong of the three-part Establishment Clause test is discussed. The concurring opinion indicated that government can run afoul of the Establishment Clause by "excessive entanglement with religious institutions, which may interfere with the independence of the institutions, giving the institutions access to government or governmental power not fully shared by nonadherence of the religion, and foster the operation of political constituencies defined along religious lines." *Id.* at 1366.

In this case there is evidence of state interference with the autonomy of the church as it controls the site and the providing of services on the premises of the nonpublic school. See GRPS Ex.11 (J.A. 214, ¶4). The areas of the private school to be used are to be "stripped of all religious material or symbols." See also (J.A. 62, ¶24).

The evidence also indicates that some churches operating church schools have refused the services provided by the School District of the City of Grand Rapids because they do not want such government intrusion. According to petitioners,

the Grand Rapids Baptist Academy is not and will not participate in the program because it will lose control over the identity and religious background of those teachers who would or may be selected by the GRPS to teach in the program. Further, the Academy believes that it is not in their best interest as a Baptist school to have GRPS teachers in their building who do not meet the strict standard of faith which applies to all teachers employed by the Academy, which requires that such staff members have a spiritual commitment to Jesus Christ as their Savior.

(J.A. 373-374, ¶295).

Thus, parents of nonpublic school children who attend those church schools participating in the program have access to governmental assistance which is not available to parents of students attending nonparticipating church-operated schools such as the Grand Rapids Baptist Academy. This is so because in practice the child attending a nonpublic school in Grand Rapids can only receive benefits if the government and the church-operated school come to an agreement and the church agrees to lease a portion of its facilities to the school district and permit the school district to assume control over part of its property, its school day, and its students during part of the time that they are under the control of the public school.

In *Lynch v. Donnelly*, *supra* at 1364, the Court referred to *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), where an

important governmental power — licensing veto authority — has been vested in churches. This Court held that giving such authority to a church was unconstitutional. The Grand Rapids program, in essence, grants to churches operating schools veto power over a child's receipt of benefits. If a church school decides that it will not permit the program to operate on its premises or take down its religious symbols or otherwise give up part of its autonomous control over the facilities and the students, it is the needy student who loses the service.

The Court in *Lynch, supra* at 1358, began its analysis by noting that "the purpose of the Establishment and Free Exercise Clauses of the First Amendment is 'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the others.' *Lemon v. Kurtzman*, 403 U.S. 602, 614." Although the Court in *Lemon* also acknowledged that total separation is not possible in an absolute sense, this Court has never abandoned its awareness that institutional entanglement is an evil with which the Establishment Clause of the First Amendment is concerned.

In *Mueller v. Allen*, 103 S.Ct. 3062, 3071 (June 29, 1983), this Court applied the third part of the *Lemon* inquiry — the excessive entanglement prohibition — to determine whether there was "comprehensive, discriminating, and continuing state surveillance," *id.* at 3071, and found none to exist because the only requirement in any way implicating the excessive entanglement prong was that of state officials deciding to allow or disallow deductions taken from "institutional books and materials used in the teaching of religious tenets, doctrines, or worship." *Id.* at 3071. This Court found that making such decisions did not differ substantially from making the types of decisions ap-

proved in such earlier opinions as *Board of Education v. Allen*, 392 U.S. 236 (1968), where this Court upheld the loan of secular textbooks to parents or children attending nonpublic schools.

However, as the Court previously noted in *Lemon v. Kurtzman, supra* at 619, "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. Those prophylactic contacts will involve excessive and enduring entanglement between church and state."

In *Meek v. Pittenger, supra* at 369, this Court spoke to this issue, as it applied to an auxiliary services case, and opined that:

We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools, like the expenditure of state funds to support the basic education program of those schools, *necessarily result in direct and substantial advancement of religious activity*. For this decisions of this Court make clear that the district court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strict nonideological posture is maintained.

In *Wolman v. Walters, supra* at 247, this Court observed that [t]he danger existed there, [in *Meek*] not because the public employee was likely to subvert his task to the service of religion, but rather because of the pressures of the environment might alter his behavior from the normal course."



The remarkable perception of this Court in *Wolman v. Walter* is supported by Monsignor John J. Leibrecht in a thought-provoking article which he wrote at the time he was assistant superintendent of schools in the Archdiocese of St. Louis. He states:

Frequently enough when one speaks about the distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing called atmosphere. It comes not from the physical facilities or the religion classes, or the students — at least not chiefly. It comes, for good or for bad, from the faculty. The most distinctive and valuable thing the Catholic school can offer to parents is its faculty — even more important than the religion classes themselves to the totality of curriculum.

The faculty is a Christian community involved in the experience of together living Christian community life. The student comes to the Catholic school not to be taught *about* Christian living, but to *experience* Christian living. The student is not merely prepared for further Christian living. He gets caught up now in Christian living. . . . When the student comes into the Catholic school he somehow becomes involved in the faculty's own Christian community life. Just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible is that spirit created by the common Christian life conscientiously lived by the faculty and participated in by the students. The school is then

truly the extension of the parents and their hopes for their children.

Leibrecht, "Thoughts on the Catholic School," *The Catholic Educator*, May 1966, p. 27 at 28, 33.

To permit the child benefit theory to be extended to permit public funds to be used to place "teachers in parochial schools" would place form over substance. In fact, there would be no logical stopping point. In both instances services are directly related to the advancing of the religious educational missions of the schools.

Petitioners suggested that the Grand Rapids program is operated free from the no religious symbol requirement of the program. However, there is testimony that at least one shared-time reading teacher in her circuit of reading assignments has had to cover up religious symbols. When asked what kind of reaction that provoked from her students, she surmised that they thought that she was "an Atheist" or "a strange." (J.A. 428, ¶97). In addition, there is also evidence that at one parochial school a public address system with speakers in the hallway and classrooms has been used to pipe morning prayer into the shared-time classroom. (J.A. 428, ¶98).

Petitioners have sought to distinguish this case from *Meek v. Pittenger* by suggesting that there is a six-year operational history of the challenged activities on leased premises (Joint Brief of Petitioners, p. 26). It should be noted, however, that this lawsuit was filed on August 4, 1980, thus a great portion of those six years of operation has been under the threat of an adverse determination in this case and the watchful eye of the plaintiffs in this action. Once this lawsuit is terminated, the limited monitoring provided by this court action will be eliminated. With-



out the "comprehensive, discriminating, and continuing state [school district surveillance] referred to in *Lynch v. Donnelly*, *supra* at 1364, there can be no assurance that the program will be conducted in a religiously-neutral environment. Plaintiffs do not believe that the removal of religious symbols in one room of a religious institution dedicated to the religious mission of its sponsoring church creates a nonreligious or religiously-neutral environment.

In *Wheeler v. Barrera*, 417 U.S. 402 (1974), this Court considered two issues: (1) whether Title I of the Elementary and Secondary School Act of 1965 (the legislative provision under attack in *Flast v. Cohen*, *supra*) required the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students and (2) whether the requirement, if it exists, contravenes the First Amendment. Significantly, this Court concluded that it could not reach a decision on either issue at that particular stage of the proceedings. Nevertheless, Justice Powell, in a concurring opinion, indicated that he "would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools." *Id.* at 428.

Perhaps most relevant for this Court's consideration is the Court of Appeals' wise observation that

[w]e should also point out that while the three churches involved at this time in this program have reputations for social responsibility, the same sort of program, if legitimized by ultimate legal authority and spread nationwide, will face applications for similar assistance by dozens if not hundreds of religious organizations. Many less orthodox religious sects would be equally en-

titled to public funds from these programs, assuming they meet state law standards. Many of them may also act as a result of religious zeal and economic need with much less responsibility than the district judge and this court have assumed was true concerning these defendants. Extensive monitoring would be required to maintain even a surface appearance of separation of church and state.

*Americans United for Separation of Church and State v. The School District of the City of Grand Rapids*, 718 F.2d 1389, 1407-1408 (6th Cir. 1983).

### CONCLUSION

For the reasons set forth herein, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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June 11, 1984

JUN 18 1984

AMERICAN L. STEVAS  
CLERK

IN THE

**Supreme Court of the United States**

October Term, 1983

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEESTMA,

*Petitioners,*

*vs.*

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,

*Respondents.*

**On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit**

**BRIEF AMICI CURIAE OF THE AMERICAN JEWISH  
CONGRESS ON BEHALF OF ITSELF, THE AMERICAN  
CIVIL LIBERTIES UNION, AMERICANS FOR  
RELIGIOUS LIBERTY, THE ANTI-DEFAMATION  
LEAGUE OF B'NAI B'RITH, THE NATIONAL  
COMMITTEE ON PUBLIC EDUCATION AND  
RELIGIOUS LIBERTY AND THE NATIONAL  
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QUESTION PRESENTED

1) Does the Establishment Clause permit a public school district to enter into an agreement with a religious school to operate "shared-time" and "community education" programs in religious schools?

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Interests of the Amici

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political and civil rights of Jews and to promote the principles of democracy. It is committed to the preservation of the great freedoms secured by the First Amendment, and especially the freedoms secured by its Establishment and Free Exercise clauses.

In 1964, it adopted a resolution opposing "shared time" programs, even when conducted in public school facilities, on the ground that such programs "would threaten gravely to undermine the public school, one of the bulwarks of American democracy."

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members. It



was founded over 60 years ago and is dedicated to defending and preserving the principles embodied in the Bill of Rights. The ACLU has been involved in many of the leading First Amendment cases by which separation of church and state has been maintained.

The National Coalition for Public Education and Religious Liberty is a national coalition of organizations, listed in Appendix A, sharing the common objectives of preserving religious freedom and the separation of church and state in public education.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League ("ADL") was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all

creeds and races and to combat racial and religious prejudice in the United States. The ADL has consistently adhered to the principle that these goals, and the general stability of democracy, are best served by the separation of church and state.

In support of this principle, the Anti-Defamation League has previously filed amicus briefs before this court in numerous cases. Thus, the League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedom.

The National Education Association (NEA) is a nationwide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public education institutions. NEA has a strong interest in

preserving religious freedom and maintaining the separation of church and state in public education.

Americans for Religious Liberty is a nationwide, nondenominational, nonpartisan, nonprofit, educational organization of individual citizens and taxpayers, dedicated to defending the First Amendment principle of separation of church and state. It maintains that virtually all forms of direct or indirect public financial aid to religious private education violate the Establishment Clause.

All the amici have frequently participated in litigation challenging aid to religious schools because they are committed to the integrity of the Establishment Clause, as well as the meaningful survival of the American public



school system. That system, together with the principle of church-state separation, are among this nation's most significant contributions to contemporary civilization. Because the integrity of both would be endangered if the decision below is reversed, they respectfully submit the attached brief with the consent of the parties.

Appendix A

The constituents of National PEARL are: American Association of School Administrators; American Civil Liberties Union; ACLU National Capital Area; ACLU of Connecticut; American Ethical Union; American Federation of Teachers; AFL-CIO; American Humanist Association; American Jewish Congress; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League of B'nai B'rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Michigan Council About Parochialism; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochialism; National

Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Women's Conference; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; Unitarian Universalist Association.



## STATEMENT OF THE CASE

### Introduction

Michigan authorizes, and partially finances the operation by local public school districts of "shared time" and "community education" programs for students of religious schools. The Grand Rapids School District ("District") in partnership with the religious schools of Grand Rapids, operated an extensive program of such classes on the premises of each of the religious schools in the city.\*

#### A. The Grand Rapids Programs

##### i. The Shared Time Classes

The "shared time" classes took place during regular religious school hours on religious school premises. The basic

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\* References to the opinions of the lower courts are to the appendix to the petition for certiorari and are cited as "    a." References to the Joint Appendix are cited as "J.A."

"shared time" curriculum included art, music, physical education, industrial arts, and remedial and enrichment reading and math classes. [76a-77a]. It was designed to complement the educational program offered by the religious schools.

ii. The "Community Education" Classes

"Community education" classes took place before and after regular instructional hours. Some classes were recreational, but many were curriculum related such as educational games, [J.A. 201, 211, 212], computers [J.A. 210, 213], yearbook [J.A. 207, 210, 213], math and reading games [J.A. 207-208, 210, 211], drama [J.A. 211], and educational films. [J.A. 212] The District Court found, in fact, that "community education" programs were available to public school students, "usually as a part of their more extensive regular curriculum." [78a-79a; J.A. 167]

iii. Student Participation

Although in theory open to all, participation in both programs was limited, in actual practice, to students attending the host religious school. Since identical classes were offered in each public school, it was unnecessary for public school students to attend classes held in the religious schools. [Brief at 12, J.A. at 326a]

Students participating in the remedial and enrichment reading and math "shared time" classes were chosen by public school teachers from students recommended by the religious schools. [See, e.g., J.A. 6, ¶14; 64, ¶12 (reading); 60, ¶17; 75, ¶19 (math)] Attendance at other "shared time" classes was determined solely by the religious schools. [J.A. 42, ¶14] Participation in "community education" classes was entirely voluntary. [J.A. 186]



iv. The Teachers

"Shared time" teachers were public school teachers assigned to particular religious schools by public school authorities, [J.A. 68, ¶9]. "Community education" teachers, by contrast, were typically recruited from each religious school's faculty. In order to attract students to these "after hours" classes, it was necessary to have teachers who the participating students knew and liked. [J.A. 186-87, 78a]

The District Court noted that, as a result of the dual roles assigned them, "community education" instructors might teach the same course twice, sometimes as a public school "community education"

teacher and sometimes as a religious school teacher. [117a-118a]\*

"Shared time" teachers were repeatedly warned by public school authorities that they were not to discuss religion in their classes. [J.A. 53-54, ¶¶11-13; 58; 72-3, ¶16; 78; ¶10; 82; 86, ¶9; 90, ¶9; 95, ¶9; 99]

The record is silent about what instructions were given "community education" teachers, what supervisory mechanisms existed to insure enforcement of those instructions, and the extent to which these prophylactic measures were successful.

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\* For example, one teacher at Christian High School taught physical education both as a faculty member of the school and as a member of the "shared-time" faculty of the public schools. This same teacher served as the religious school's basketball coach. The District Court termed this situation "bizarre" and "unfair" to the teacher, and expressed concern for his students "who [were] required to pretend during the day that they are somehow different than they are at night." [117a-118a]

v. The Facilities

The "lease" under which the public schools used religious school facilities designated no specific room for use by public school classes and did not reserve "rented" space for use exclusively by the public schools. The lease was in effect only on "scheduled school days during the school year" [J.A. 202-04] and did not provide that the leased premises could not be used for religious school classes when "shared time" classes were not in session. The record shows that many "shared time" classes were offered in different classrooms on different days. [J.A. 69, ¶10; 76, ¶26; 99; 100]

District regulations required the display of a sign designating "leased" space as a public school when "shared time" classes were in session, [J.A. 200] but not at other times. [J.A. 64, ¶10; 214; 75a]



While "shared time" guidelines issued by the District did require the removal of religious artifacts from leased space [J.A. 214], and teachers were told of this regulation, [J.A. 64, ¶9; 69, ¶10; 85, ¶22] this prohibition was not always honored. [J.A. 62, ¶24, 65, ¶13; 76, 93-4, ¶20].

On occasion, "shared time" teachers had to ask that religious symbols be removed from "shared time" classrooms [J.A. 62, ¶24; 94, ¶20] and at other times they were instructed to simply ignore their presence. [J.A. 76, ¶26]\*

The presence of the programs on religious school premises gave students a feeling of being in their own place and helped "integrate" the shared time program with the religious school program. [J.A. 104, ¶14]

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\* "I do on occasion see religious symbols in rooms which may be visited once or twice a day. Teachers are specifically directed to ignore such and conduct the assigned lesson. Religious symbolism ... is one area which I check during each visit."

The "public school" programs did not take place on religious school holidays, even when the public schools elsewhere were in session [79a, J.A. 96, ¶11; 103]

vi. Curriculum and Materials

Although the record does not reflect any overt intrusion of religion into the enrichment and remedial reading and math classes, [see, e.g., J.A. 68, ¶24], the "shared time" music program was subject to sectarian influences and reflects the close coordination between the religious and "public " schools.

Music teachers taught a program of vocal music [J.A. 91] which included religious music. [J.A. 90] "Shared time" music teachers were told, in response to requests from the religious schools, that

they could prepare students for religious school "Christmas programs" [Id.] and that they might "use any text, including a religious text, they would feel comfortable using in a public school." [J.A. 93]

Religious school teachers were encouraged to attend "shared time" music classes, and received a lesson plan and suggested activities for followup. [J.A. 93-4]

vii. Political Uses of the "Shared Time" and "Community Education" Programs

The District Court found that actual political controversy existed over the "shared time" and "community education" programs.

In preparation for the March 1980 school millage campaign, the Grand Rapids Board of Education published Citizens Handbook Millage - '80, ... In that booklet, the Board of Education ... made a purposeful effort to influence favorably the taxpayers sending children to non-public schools on the basis of benefits conferred under the programs challenged herein....



It is sensible ... for the District to appeal to those ... who ... send their children to private schools. While sensible, it is also a political appeal to the voting community. As such, it invites opposition, as do all political propositions. [112a-114a; 28a-28a]

B. The Participating Religious Schools

The District Court and the Court of Appeals found that the religious schools were "pervasively religious" as that term is used in this Court's parochial school aid decisions. [109-21a; 79a-90a] Each is an effort to create a "community of faith." [J.A. 107, ¶10; 110, ¶10; 149, ¶14; 271] Each conducted classes in religion, [J.A. 110, ¶11] which students were typically required to attend\* and each offered mandatory periods of group worship because "recognition of God is part of total educa-

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\* Where students of different faiths were admitted, they were sometimes required to substitute instruction in their own faith for that of the school. In Catholic schools, students of other faiths could be excused from religious services upon parental request. [J.A. 113, ¶22]

tion." [J.A. 121-22, ¶9; 136, ¶10] Academic subjects, while taught in secular form, are examined from a religious point of view. [J.A. 111, ¶11; 120, ¶6; 134, ¶7; 151-52, ¶22]\*

Each participating school extended at least a preference in admission to students of the faith sponsoring the school. [J.A. 143, ¶6; 148, ¶13] Some required a commitment to abide by the school's religious code of conduct. [J.A. 140, ¶8; 148, ¶12] In each, the majority -- typically the overwhelming majority -- of students, teachers, and administrators, shared a common faith. [J.A. 107, ¶9; 117, ¶29; 119, ¶4; 260; 261]

Teachers were either expected to adhere to the faith of the school [J.A. 151,

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\* The members of the Grand Rapids Christian Association believed, for example, that "the Word of God must be an all-pervading force in the educational program." [J.A. 271; 270]

¶19] or to teach within the "general philosophic framework of the school." [J.A. 117, ¶28; 118; ¶3]

Each participating school held itself out to the public as religious, and as offering an education compatible with, and arising from, its religious world views.

[See, e.g., J.A. 279-289]

Governance of the religious schools was typically vested in a board of directors largely, and frequently exclusively, composed of members of the denomination operating the school and members of its clergy. [J.A. 115, ¶25; 133, ¶5, 271]

#### C. The Litigation

Six individual taxpayers and Americans United for Separation of Church and



State\* filed suit challenging the District's "shared time" and "community education" programs. The School District of the City of Grand Rapids, the State Superintendent of Public Instruction, and the State Board of Education were named as defendants [hereafter "petitioners" or the "District"]. Parents of participating students intervened, and are also petitioners here. With minor exceptions,\*\* the District Court held the program unconstitutional.

Petitioners appealed from so much of the judgment as struck down:

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\* The District Court found that the individuals had taxpayer standing. However it dismissed Americans United for want of standing, citing Valley Forge Christian College v. Americans United for Separation of Church and State, 102 S.Ct. 752 (1982). No cross appeal was filed from that action.

\*\* The District Court upheld "drownproofing," outdoor education and driver education programs. Respondents did not appeal from that judgment.

- a) "shared time instruction in the elementary schools," (remedial and enrichment reading and math, art, music and physical education);
- b) "shared time" remedial high school math;
- c) "community education" in "leisure-time activities" in the elementary schools.

The judgment, was, however, affirmed by the Court of Appeals.

#### SUMMARY OF ARGUMENT

The Grand Rapids "shared time" and "community education" programs are operated by the public school system in partnership with religious schools. That partnership includes joint operational responsibilities for core-curriculum education at the religious school, and involves joint students, faculty, facilities, financial resources and administrative bureaucracy. Such a fusion of the public school and religious school systems violates the Establishment Clause:

1. The "fusion" of governmental and religious functions is one of the principal dangers the Establishment Clause was designed to prevent. Larkin v. Grendel's Den, 103 S.Ct. 505 (1982). Although government and religion need not be adversaries, they also may not undertake a joint education program. School District of Abington Township v. Schempp, 374 U.S. 203 (1963). In this case the extensive functional and administrative interrelationships between the public school and religious school systems involve precisely that form of "institutional entanglement," Lynch v. Donnelly, 104 S.Ct. 1355, 1367 (1984) (O'Connor, J., concurring) which threatens the independence and integrity of both government and religion. Moreover, the "fusion" of functions in this case is far more severe than other government/religion partnerships in education which have previously been declared unconstitutional.



Meek v. Pittenger 421 U.S. 349 (1975);  
McCollum v. Bd. of Educ., 333 U.S. 204  
(1947).

2. The "shared time" and "community education" programs are objectionable when measured against the tripartite test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). Although amici do not contend that the District's programs were established with a religious purpose, they clearly have the effect of advancing religion and result in an impermissible entanglement of government and religion, including actual political divisiveness.

ARGUMENT

I. THE SCHOOL DISTRICT HAS ESTABLISHED  
A CONSTITUTIONALLY IMPERMISSIBLE  
PARTNERSHIP WITH THE RELIGIOUS  
SCHOOLS

This Court has repeatedly and consistently recognized that the "core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions,"

School District of Abington Twshp. v. Schempp, 374 U.S. 203, 222 (1963)." Larkin v. Grendel's Den, 103 S.Ct. 505, 512 (1982). Compare, McCollum v. Bd. of Educ., 333 U.S. 203 (1948), with Zorach v. Clauson, 343 U.S. 306 (1952).

Such a "fusion" necessarily entails a dangerous "institutional entanglement," Lynch v. Donnelly, supra, 104 S.Ct. at 1367 (O'Connor, J., concurring) that threatens the independence of religious institutions, as well as poisoning the institutions of government by creating "political constituencies defined along religious lines." Id., at 1366.

Moreover, while government and religion certainly need not be hostile adversaries, any union of the two in a joint undertaking -- particularly an enterprise as sensitive as religious education -- will have the effect of advancing religion, by providing a "significant

symbolic benefit to religion" generally, Larkin v. Grendel's Den, supra, at 511, by reason of the power inherent in that governmental alliance, and by affording practical resource and financial assistance to the religious institutions.

In this case, the District's program brings about precisely such an impermissible fusion of public and religious education. Here, the religious enterprise receives substantial and recurring government support, Everson v. Bd. of Educ., 330 U.S. 1 (1947), and the government has significant operational responsibility for the educational program of the religious schools. In short, it is no exaggeration to say that the District has, in effect, created a system of public religious education.

By ignoring the constitutionally distinct roles of government and religion -- even viewed from a modern, later



twentieth century perspective, see e.g.,  
Lynch v. Donnelly, supra; Marsh v.  
Chambers, 103 S.Ct. 3330, 3322 (1983);  
Mueller v. Allen, 103 S.Ct. 3062, 3069  
(1983)\* -- this joint venture involves  
just such an "establishment" as the First  
Amendment was designed to avoid:

Primary among the evils against which  
the Establishment Clause protects  
"have been sponsorship, financial  
support, and active involvement of  
the sovereign in religious activity,"  
Meek v. Pittenger, 421 U.S. 349, 359  
(1975), quoting Walz v. Tax  
Commission 397 U.S. 664, 668  
(1970).

In Meek, the Court struck down a  
government program in which special

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\* Mueller v. Allen is considered at pp.  
43- 44, infra. Neither Lynch nor Marsh  
involved a pervasive, continuing and  
institutionalized joint enterprise in the  
sensitive area of education of the young,  
an area which has been the direct subject  
of the long line of decisions of this Court  
noted in this brief. None of these three  
cases can be deemed to have overruled sub  
silentio the firmly established principles  
supporting the decisions below. Indeed, in  
Lynch v. Donnelly, supra, 104 S.Ct at 1366,  
this Court reaffirmed their validity.

education courses (remedial and accelerated reading instruction) and auxiliary services (psychological counseling and speech therapy) were provided by public school officials on religious school premises.\* The Court held that in the face of the "massive aid provided the church-related nonpublic schools," (421 U.S., at 365) it would "simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by ... church related" schools (id.).

In this case, however, evidence of the prohibited government/religion "fusion" is far more extensive, and involves a more serious combination and confusion of roles,

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\*The Meek Court also rejected that portion of the challenged statutes permitting religious schools to use public school system "instructional materials" (projectors, laboratory equipment, and the like), although the Court found constitutionally permissible the direct "loan" of textbooks to students attending religious schools. Id.

than anything presented in Meek v. Pittinger, supra. Here, the public and religious systems share students (whose entry to the "shared time" program is controlled by religious school officials); here they share faculty; here they share financial and professional responsibility for the provision of core-curriculum educational services to their joint students; here they share a common, undifferentiated space on the premises of the religious schools; and, finally, here they share an extensive administrative structure to coordinate the scheduling of 1500 classes offered by 470 nominal "public school" teachers in the religious schools.



[118a-119a]\* Given that pervasive

\* Thomas v. Schmidt, 397 F. Supp. 203 (D. N.H. 1975), aff'd, 539 F.2d 701 (1st Cir. 1976), at 214, stated the point well:

A parochial school and a public school in a dual enrollment arrangement are not merely sharing the same building; they are sharing the same students. The two schools at best effectuate a partnership, if not for all intents and purposes a complete merger .... Thus when the Court in Paire refers to "an artificial public school within a church school," it refers to a public school that is not merely physically within the same building, but one that is functionally the very same school.

Accord, Americans United v. Porter, 485 F.Supp. 432 (W.D. Mich. 1980); Americans United v. Oakey, 337 F.Supp. 545; D.Vt. 1972); Americans United v. Paire, 348 F.Supp. 506 (D. N.H. 1972), vacated and remanded, 475 F.2d 462 (1st Cir. 1973) after remand, 359 F.Supp. 505 (D. N.H. 1973); School Dist. v. Neb.State Bd. of Educ., 118 Neb. 1, 195 N.W. 2d 161, cert. denied, 409 U.S. 921 (1972).

Arguably to the contrary is PEARL v. Hufstedler, 489 F.Supp. 1248 (S.D.N.Y. 1980), app. dismissed (on grounds of timeliness), 449 U.S. 808, (1980), but that case is distinguishable on its facts because the Court found the schools in question to be not "pervasively religious."

entanglement, it is not surprising that the Court of Appeals in this case concluded that if the Grand Rapids program be deemed constitutionally permissible then "the separation of church and state will be effectively ended in the field of public education." [40a].

Of course, some "cooperation" between government and religion is inevitable, and indeed desirable. But there are constitutional limits on such cooperative efforts that can be discerned from juxtaposition of McCullum v. Bd. of Educ., supra, and Zorach v. Clauson, supra.

In McCullum, the Court examined a program of religious instruction in the public schools; this case involves public education programs in the religious schools. Both are prohibited by the Establishment Clause for the same reasons. Indeed, in McCullum the Court rejected a scheme which, compared to the facts of this

case, involved only a relatively modest "fusion" of church and state: in McCollum the religious classes in question were few in number, conducted only weekly for no more than 45 minutes, and involved no expense, no faculty overlap\* and no joint administrative structure.

By contrast, in this case the "fusion" was deep and solid. Thus, in this case, far more than in McCollum, the District's program offends the Establishment Clause because of the degree to which it "assists and is integrated with the program of religious instruction carried on by the separate religious sector." 333

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\* Joint faculty arrangements are both formally established in the community education program (where the public system literally "hires" regular church school teachers), and more circumspectly, though nonetheless effectively accomplished, in the shared-time program (where former church school teachers are hired by the public system to work in the very same church school that used to employ them directly).



U.S. at 209; see also id. at 231  
(Frankfurter, J., concurring).

That constitutional proscription against blending secular and sectarian education was underscored by the decision in Zorach, where the Court upheld the "early release" of public school students for religious training only because that program successfully avoided the church-state partnership found objectionable in McColum.

Thus, in Zorach, the religious instruction did not begin (for the children involved in the program) until after public school classes had ended, and the two school systems did not share facilities, teachers, finances or any other resources. Of course, in Zorach there was some measure of cooperation between government and religion (id. at 314); but the Court also recognized the constitutional distinction between cooperation and confederation:

Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education, nor use secular institutions to force one or some religion on any person. 343 U.S. at 314 (emphasis added).

Furthermore, the constitutional significance of that "blend" of secular and sectarian education is heightened, not diminished as petitioners suggest (Brief at 29-30), by a government program that complements, rather than displaces, the core religious school educational program. The dovetailing of the public schools' offerings with those of the religious schools suggests a common venture, not the two independent endeavors the Constitution

demands.\*

Finally, in an effort to save these otherwise unconstitutional programs, the District has resorted to two transparent legal fictions calculated to create the appearance of separateness where none exists.

First, the so-called lease agreement is, as a matter of real property law, more aptly labeled a license, since no particular space is specified, and classes are not confined to a particular room, United Coin Meter Co. v. Gibson, 311 N.W. 2d 442 (Mich. Ct. of Appeals 1981); 2 Powell, Real Property, ¶220 (4) at pp. 212-13 (1984).

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\* The existence of a public-religious partnership in the education of religious school students is exemplified by the "shared time" music education program, in which religious school teachers are invited to sit in on the "public school" classes and as part of which "public school" teachers cooperated with the religious schools in creating Christmas and other religious holiday assembly programs.



More importantly, for Establishment Clause purposes, the existence of the lease lends no support to the District's contention that the two challenged programs have an existence demonstrably separate from that of the religious schools in which they operate. No space is reserved for those programs; there is no prohibition on public and religious schools alternating the use of a particular room; there is not even an absolute assurance that sectarian symbols will not be displayed in this "leased " space.

Second, the portable signs posted in rooms being used in the program proclaiming these rooms to be public schools, like the posted disclaimers of sectarian purpose rejected by this Court in Stone v. Graham, 449 U.S. 39 (1980), should not blind this Court to the fact of a pervasive cooperative educational venture. These legal fictions notwithstanding, the District has

blended secular and religious education in exactly the way the Establishment Clause forbids.

II. APPLICATION OF THE TRIPARTITE TEST  
REQUIRES AFFIRMANCE.

A. The "Shared Time" and "Community Education" Programs Are Invalid Under the Tripartite Test

The tripartite test for Establishment Clause violations was first enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971), and restated most recently in Lynch v. Donnelly, supra. As Justice O'Connor pointed out in her concurrence in Lynch v. Donnelly, 104 S.Ct. at 1366, the test serves to ferret out those relationships which impermissibly fuse church and state. It requires that, to be constitutional, a governmental practice must have a secular

purpose,\* a direct, and substantial secular effect, and must not unduly enmesh government and religious institutions in the affairs of each other, either administratively or politically. Lynch v. Donnelly, supra, 104 S.Ct. at 362.

B. Administrative Entanglement

Aid to religious schools frequently founders on constitutional shoals because

\* The amici do not contend, in light of numerous decisions of this Court involving aid to religious schools, that the District's program lacks a secular purpose.

The U.S. Catholic Conference, in its brief amicus curiae (pp. 17-8) suggests that the presence of a secular purpose is a factor weighing in favor of constitutionality. This Court implicitly rejected that argument in Lemon, PEARL v. Nyquist, Meek v. Pittenger and Wolman v. Walter, 433 U.S. 229 (1977).

The contention of the amicus amounts to a plea for this Court to balance a valid secular purpose against Establishment Clause values, something this Court has never done. Imposing a balancing test in Establishment Clause cases would substantially undo what the founders commanded -- to keep government from involvement with religion.



it creates a need for "comprehensive, discriminating, and continuing state surveillance," Lemon v. Kurtzman, supra, 403 U.S. at 619, to insure that the aid is not misdirected to sectarian uses.

It is, therefore, ironic that petitioners in this case, in attempting to demonstrate that the Grand Rapids "shared time" and "continuing education" classes do not advance religion, emphasize the extent to which the District has created just such a system of government surveillance for these programs. [Brief at 35-41]

Thus, petitioners argue that "shared

time"\* teachers are repeatedly instructed on the prohibition against religious instruction, both orally and in writing, and that religious school officials are told of it as well. Supervisors check compliance with these instructions, as well as classrooms, and at times asked religious

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\* Petitioners are silent about the measures taken to insure that the "community education" program remains free of sectarian influences. [79a] The District Court noted the particular difficulties which would be encountered in such an effort, because the program uses religious school teachers [Id.] 117a-118a) and because those teachers taught courses in the program similar to the ones they taught for the religious schools [Id.]

The failure to institute such controls is constitutionally fatal. "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion....," Lemon v. Kurtzman, supra, 403 U.S. at 619.

But such measures would in any event be insufficient. Like the state subsidized teachers at issue in Lemon, the "community education" teachers who are primarily employed by a religious organization, "would find it hard to make a total separation between secular teaching and religious doctrine." (403 U.S. at 618-19)

school officials to remove such symbols. Formal mechanisms exist for teachers to report violations of these rules. [See supra at p.5].

These mechanisms, designed to minimize the likelihood that "subsidized [religious school] teachers [will] inculcate religion, "make the program unconstitutional, for they "involve excessive and enduring entanglement between state and church." Lemon v. Kurtzman, supra, 403 U.S. at 619.

The District suggests [Brief at 25, 27] that the need for supervision is ameliorated by the inherently secular nature of the classes. This Court has twice rejected this very argument in regard to remedial reading and math programs identical to those at issue here, Meek v. Pittenger, 421 U.S. at 370-71; Public Funds for Public Schools v. Marburger, 358 F.Supp. 29, aff'd, 417 U.S. 961 (1974).



The subject matter of "shared time" classes, as well as those of many of the "community education" programs, are not so cut and dried, so routine, so incapable of use to further the religious mission of the religious schools, that the supervision may be dismissed, as purely routine and standardized. PEARL v. Regan, 444 U.S. 646 (1980); Meek v. Pittinger, supra; Wolman v. Walter, supra. The relationship between a teacher and a student is varied and not easily cabined into pre-set or pre-defined categories.

Like the remedial programs involved in Meek and Wolman, the "shared time" and "community education" programs have an "educational content ... closely associated with the educational mission of the non-public school," Wolman v. Walter, supra; 433 U.S. at 244; Meek v. Pittenger, supra. Because the subject matter of the courses offered in these programs provide opportu-

nities for the transmission of sectarian views, they require a degree of supervision of the religious schools by public officials incompatible with the Establishment Clause, Wolman v. Walter, supra.

C. The Grand Rapids Program Creates Political Divisiveness

In cases such as this involving the subsidy of religious institutions, the potential for political divisiveness is a warning sign that the Establishment Clause is being violated. PEARL v. Nyquist, supra; Lemon v. Kurtzman, supra, 403 U.S. at 622-25; Walz v. Tax Comm'n, 397 U.S. at 695-96 (1970) (Harlan, J. concurring); Mueller v. Allen, supra, 103 S.Ct. at 3071, n.11; but see Lynch v. Donnelly, supra, 104 S.Ct. at 1365, Id. at 1367 (O'Connor, J., concurring). The courts below correctly took notice of this

warning, and evaluated the entire program in light of it. [114a]

The District Court in this case found the programs generated political controversy. [109a-112a; 28a-29a] The School District injected the challenged programs into the political arena by insisting that these programs offered a reason for voters to endorse higher local property taxes to support education. Candidates for the school board supporting the increase noted that they paid for these programs. It is precisely this type of political response which is discouraged by the Establishment Clause, Lemon v. Kurtzman, supra, 403 U.S. at 622, in order to avoid the politicization of religious differences in the recurring process of allocating governmental resources.

The District emphasizes [Brief at 31] that the "shared time" and "community education" classes were open to all religious



schools, and argues that this even-handed policy lessens the dangers of political divisiveness created by the "shared time" and "community education" classes.

While discriminatory treatment would violate the Establishment Clause, Larson v. Valente, 456 U.S. 228 (1982) supra, it does not follow that even-handed subsidies are constitutional, Everson v. Bd. of Educ., supra.

That the District has entered into a partnership with a substantial portion of the religious community of Grand Rapids and injected the existence of that partnership into the political process makes that partnership all the more suspect for it runs a substantial "risk of significant religious or denominational control over [the] democratic processes..." Mueller v. Allen, supra, 103 S.Ct. at 3069, quoting Wolman v. Walter, 433 U.S. at 263 (Powell, J., concurring in part, dissenting in

part). That risk is too great for this Court to tolerate.

D. The "Shared Time" and "Community Education" Programs Have The Direct Immediate and Substantial Effect of Advancing Religion

Government may unconstitutionally aid religious education in a variety of ways: it may offer religious instruction, it may subsidize religious education, or it may "blend secular and sectarian education," Zorach v. Clauson, supra, 343 U.S. at 314. Where it does any of these, government communicates a message of endorsement of religion, Lynch v. Donnelly, supra 104 S.Ct. at 1368 (O'Connor, J. concurring). In this case, the District has done all three.

i. The District is Offering Sectarian Instruction

We have earlier discussed the "shared time" music program, and its use for religious instruction, p. 27, supra. There exists, moreover, a substantial likelihood

that some of the "community education" classes, such as those in "yearbook," would be used for that same purpose, see, p. 2, supra.

ii. The District is Subsidizing Religious Education

The "shared time" and "community education" programs subsidize religious education by "the direct transmission of assistance from the state to the schools themselves."\* Mueller v. Allen, supra, 103 S.Ct. at 3069. In this case, that aid was substantial in absolute terms, and, for that reason it may be said to have a direct effect of advancing religion, cf. Meek v. Pittenger, supra, 421 U.S. at 369.

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\* It is of little, if any, constitutional significance that the aid does not take the form of a direct financial subsidy, PEARL v. Regan, supra, 444 U.S. at 658-59. The United States is therefore not correct (Brief amicus at 15-16), in asserting that, under the Mueller distinction between impermissible direct aid and permissible indirect aid, the aid challenged here is to be categorized as indirect because it does not transfer funds to the schools.



But there is a far more fundamental reason for finding an impermissible effect here. Like the remedial programs invalidated in Meek v. Pittenger, supra, (421 U.S. at 371).

the District was

performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained.\*

Both of the elements identified in Meek as demonstrating the existence of an impermissible effect -- "important educational services" and "schools in which education is an integral part of the dominant sectarian mission" -- are present here.

\* See Wheeler v. Barrera, 417 U.S. 402, 428 (1974) (Powell, J. concurring). ("I would have serious misgivings about the constitutionality of a statute that required utilization of public school teachers in sectarian schools."); Johnson v. Sanders, 319 F.Supp. 421 (D. Conn. 1970), aff'd, 403 U.S. 995 (1971).

a) The District Performs Important Educational Services

That the remedial and enrichment reading and math programs are "important educational services" is demonstrated by Meek. Art and music are likewise important educational services. [J.A. 101, ¶18] (art instruction part of students' "total education")\* And the "community education" program offers a variety of educationally related classes, most of which are part of the ordinary public school curriculum.

It is literally true that children attending religious schools benefit from the existence of the "shared time" and "community education" programs. That fact does not support an invocation of the "child benefit" theory of Bd. of Educ. v. Allen, 392 U.S. 236 (1968). Students at-

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\* The shared time physical education program was described by the supervisor of the program as meeting the "educational needs of the nonpublic students." [J.A. 82, ¶¶14-15]

tending religious schools would also benefit from direct financial aid to those schools, remedial reading programs and a host of other programs already invalidated by this and other courts.

The child benefit theory is properly invoked only where religious institutions receive "indirect and incidental" benefits from "secular and nonideological services unrelated to the primary religion-oriented educational function of the sectarian school," Meek v. Pittenger, supra, 421 U.S. at 364, and not where they benefit from programs as directly related to that educational function as those challenged here.

Petitioners [Brief at 29-32] argue that the impermissible effect of the District's subsidy of religious education is diluted because "shared time" and "community education" programs are available to a broad class of students which they define



as including students attending public schools. Cf. Mueller v. Allen, supra, 103 S.Ct. at 3068-69. Since public school students can attend the equivalent of "shared time" or "community education" classes in their own schools, students attending the challenged programs are solely religious school students.

In Mueller, parents of public school students were able to take advantage of the tax deduction, over and above their right to have their children receive a free public school education. Like the tuition aid scheme invalidated in PEARL v. Nyquist, supra, the "shared time" and "community education" programs are available only to religious school students, surely not the "broad class" contemplated in Mueller v. Allen.

This Court has rejected the argument that aid to religious school students which merely duplicates the education available

to public school students is to be treated as if it were available to all students:

[T]he argument proves too much, for it would also provide a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools -- a result wholly at variance with the Establishment Clause.

PEARL v. Nyquist, supra, 413 U.S. at 782, n.38. [emphasis added]

Nor is it relevant that the challenged courses are not required by state law, for minimum curriculum requirements do not exhaust the possibilities for primary and secondary education. The record here fully supports the finding that the "shared time" and "community education" classes were educational. As one "shared time" teacher candidly put it, [J.A. 74, ¶17] "The specific aim of the program is to ... meet the educational needs of eligible

students." See also Brief at 10 (program designed to meet otherwise "unmet educational needs").

While many parents send their children to religious schools primarily for religious reasons, many others would not enroll their children unless the schools were roughly comparable academically to the public schools. See U.S. Department of Education, Private Elementary and Secondary Education: Congressionally Mandated Study of School Finance, Vol. 2 (1983) at Tables 4-2, and 4-3.

The District, by undertaking joint fiscal and professional responsibility for the operation of the educational program of the religious schools, directly and substantially furthers their ability to carry out their mission of religious education by enabling them to reach a far larger audience than they otherwise could.



b. The Schools Participating in the  
Programs Are Pervasively Religious

The religious schools participating in the "shared time" and "community education" programs are, as the District Court found after a review of the extensive record, and a visit to the schools, [J.A. 1] pervasively religious, despite petitioners' claims to the contrary. [Brief at 33-35] The participating schools are (in the words of one school) "communities of faith in which the Christian message, the experience of worship community, and social concern are integrated in the total experience of the

students ... and members of the faculty.\*\*  
Prayer and religious instruction are an integral part of their curricula and students are expected to attend these activities, compare Roemer v. Bd. of Public Works, 426 U.S. 736, 756-57 (1976) (attendance at services voluntary; compulsory theology course taught as a liberal arts course).\*\*

The schools, while claiming not to distort secular subjects to coincide with

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\* Catholic Central High School, quoting the National Catechetical Directory, J.A. 242. See for similar statements, J.A. 261 (West Catholic High School); J.A. 107 (Catholic schools generally); J.A. 225 (Grand Rapids Baptist Academy); J.A. 270 (Grand Rapids Christian School Association); J.A. 271 (same); J.A. 280 (same); J.A. 149 ¶14, J.A. 151 ¶20 (Immanuel-St. James Lutheran School); ("Word of God must be an all-pervading force in the educational program."); J.A. 280 (remark of Carole Barker, teacher in a Christian school: "Everything we do has to be based on scriptures ... and that can be intertwined in everything that I teach").

\*\* (See, e.g., J.A. 149-50 (Immanuel St. James Lutheran School); J.A. 136 ¶10 (Grand Rapids Christian School Ass'n); J.A. 113-14 (Grand Rapids Catholic Schools).

religious dogma, do examine these subjects from a religious point of view,\* and do teach moral (religious) values, although perhaps not in the same coercive way as was once common. In most, religion was far more pervasive than merely incidental excursions into religious viewpoints.\*\* Religious symbols were typically displayed in the classroom and hallways [J.A.].

In each case, governance of the school is entrusted to bodies overwhelmingly composed of adherents of the faith oper-

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\* [J.A. 111 (Grand Rapids Catholic Schools); J.A. 114 (same); J.A. 134-035 (Grand Rapids Christian School Ass'n); J.A. 151-52 (Immanuel-St. James Lutheran School); J.A. 270.

\*\* Members of the Grand Rapids Christian School Association, for example, believed that "the Word of God must be an allpervading force in the educational program." [J.A. 271] See also J.A. 242 (Catholic Central High School; J.A. 121-22, ¶9 (recognition of God part of total Catholic school education).



ating the school,\* if not to the church itself or its clergy. The student bodies and the faculties were overwhelmingly adherents of the sponsoring faith.\*\*

In short, although the schools may not duplicate in every respect the religious schools described in earlier cases in this Court,\*\*\* the "general picture" painted by the factual findings below, Roemer v. Bd. of Public Works, 426

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\* [J.A. 134, 148 (Lutheran Schools); J.A. 262-67 (Catholic Schools); J.A. 271-278 (Grand Rapids Christian Ass'n)]

\*\* J.A. 131 (Lutheran schools: teachers must be members of sponsoring congregations); J.A. 226 (Grand Rapids Baptist Academy); J.A. 280 (Grand Rapids Christian School Ass'n "teacher ... shares the values of the parents"). Teachers' freedom to teach is limited to the "general philosophical framework of the school." J.A. 117 (Catholic Schools).

\*\*\* The petitioners emphasize that none of the schools excludes members of other faiths, but neither did the schools held to be pervasively religious in Wolman v. Walter, supra.

U.S. at 758, is that these schools retain the essential religious characteristic of schools "whose affirmative if not dominant policy" is to assure future adherents to a particular faith ..." Tilton v. Richardson, 403 U.S. at 685-86.

They are decidedly unlike colleges and universities which retain merely the minimal sectarian affiliation particularly since they are engaged in the instruction of impressionable school age children, not more mature and independent minded students of college age, Tilton v. Richardson, supra 403 U.S. at 672, 685-86.

In sum, the "shared time" and "community education" classes had the primary effect of aiding religion because such assistance

normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in [its] religious

mission." Hunt v. McNair, 413  
U.S. 734, 743 (1973)

iv. The District Fused Secular and  
Sectarian Education

Not only do the "shared time" and  
community education" programs violate the  
strictures of Zorach by "undertaking  
religious instruction, 343 U.S. at 682, and  
subsidizing religious education, but  
finally, and in many ways most fundamen-  
tally, the programs had the effect of  
advancing religion because they "blended  
secular and religious education."

"The mere appearance of a joint  
exercise of ... authority by Church  
and State provides a significant  
symbolic benefit to religion....  
Larkin v. Grendel's Den, supra, 103  
S.Ct. at 511.

Conclusion

For the reasons stated, the joint  
enterprise which is the "shared time" and  
"community education" program violates the  
Establishment Clause. The judgment below



must therefore be affirmed.

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SEP 20 1984

No. 83-990

IN THE SUPREME COURT OF THE UNITED STATES  
October Term, 1983

DAVID L. STEVAS,  
CLERK

THE SCHOOL DISTRICT OF THE CITY OF GRAND  
RAPIDS; PHILLIP RUNKEL, Superintendent of Public  
Instruction of the State of Michigan; STATE BOARD OF  
EDUCATION OF THE STATE OF MICHIGAN; LOREN  
E. MONROE, State Treasurer of the State of Michigan;  
IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE  
and LINDA BYLSMA, ROBERT and PENELOPE COMER,  
CLARENCE and ROSALEE COVERT, SCIPUO and  
JANICE FLOWERS, JOHN and SHIRLEY LEESTMA,  
Petitioners,

-vs-

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS;  
PATRICIA DAVIS; FREDERICK L. SCHWASS and  
WALTER BERGMAN,

Respondents.

On Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit

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No. 83-990

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

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THE SCHOOL DISTRICT OF THE CITY OF GRAND  
RAPIDS; PHILLIP RUNKEL, Superintendent of Public  
Instruction of the State of Michigan; STATE BOARD OF  
EDUCATION OF THE STATE OF MICHIGAN; LOREN  
E. MONROE, State Treasurer of the State of Michigan;  
IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE  
and LINDA BYLSMA, ROBERT and PENELOPE COMER,  
CLARENCE and ROSALEE COVERT, SCIPUO and  
JANICE FLOWERS, JOHN and SHIRLEY LEESTMA,  
Petitioners,

-vs-

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS;  
PATRICIA DAVIS; FREDERICK L. SCHWASS and  
WALTER BERGMAN,

Respondents.

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On Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit

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Joint Reply Brief for Petitioners

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**I. Introduction—Respondents' Per Se Approach**

The approach and tone of the submissions of the respondents and their supporting amici emphasize the fundamental disagreement between the parties with respect to how the judiciary ought to harmonize the guarantees of the Religion Clauses with the responsibilities of state and local governments to deliver effectively the educational services which all of their citizens need and pay for through their taxes. Essentially, respondents approach this task very much as the court of

appeals. In broad strokes, they argue that *any* significant contact between *any* religiously-oriented institution and *any* public school system violates the establishment clause—regardless of what a fair assessment of the particular relationship, evaluated in its totality, might demonstrate. On the other hand, petitioners submit that, before a court frustrates a carefully developed local program, it should undertake a more precise review of the good faith efforts of a state legislature and a local school board to reconcile competing constitutional responsibilities. The court must, at the very least, examine the trial record *in its totality* and identify a *specific and actual consequence* which violates establishment clause interests.

Respondents' brief—and those of some of the amici—also suggest, at least implicitly, why some might find reliance on *per se* rules a comfortable approach in Religion Clause cases. Certainly, if one begins with a suspicion of religious institutions or with a belief that the judiciary is incapable of precise and sensitive analysis of Religion Clause issues, reliance on stereotypes quite logically follows. However, the first of these suppositions stands in stark contrast to this Court's frequent acknowledgement of the role of religious institutions in our society. The second is an extraordinary trivialization of the Court's traditional recognition that:

[T]here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree."

*Estin v. Estin*, 334 U.S. 541, 545 (1947)

This broad brush approach of the respondents creates, in our view, serious barriers to sound analysis. Therefore, in the

following pages, we shall address briefly the principal areas of distortion. First, we shall deal with the most serious distortion created by respondents' brief—failure to distinguish carefully what issues are presented on appeal and what ones are no longer in the case. Secondly, we shall address, albeit briefly, the rather gross mischaracterizations of the record which respondents' approach has precipitated. These are, of course, rather obvious and perhaps are unworthy of reply. However, their potential for impeding reasoned analysis requires our putting them to rest early on. Finally, we shall demonstrate how respondents' reliance on stereotypes and suppositions—rather than the record—has caused them to present a case which simply does not exist.

## II. Scope of Appeal

Respondents and their supporting amici, like the majority opinion of the court of appeals, repeatedly fail in their analysis to make two important distinctions: (1) they fail to distinguish between the Shared Time program and the Community Education program<sup>[1]</sup>; and (2) they fail to distinguish between those classes in each program which are subject to appeal and those which are not.

The first of these lapses creates serious problems in understanding the nature of the two programs. For example, respondents suggest that teachers in the nonpublic schools participate in the administration of the Shared Time program. *E.g.*, Respondents' Brief at 22, 35, 37. As we noted in our principal brief, the record is directly to the contrary. Petitioners' Brief at 39-41.

[1]

A detailed summary which identifies the differentiating features of each program can be found at pages 12-15 of the Joint Brief for Petitioners.



The second of these lapses (the principal examples are set forth in the margin<sup>[2]</sup>) results in the respondents' reliance on parts of the trial record not relevant to this appeal. In short, petitioners *do not* appeal those portions of the lower court rulings which concern Shared Time programming on the secondary level (with the exception of "math topics", a remedial math course), or community education courses on the secondary (high school and junior high school) level (*i.e.*, either before or after school). They *do* challenge the lower court rulings regarding the following programs:

1. Shared Time instruction on the elementary level in remedial and enrichment math, remedial and enrichment reading, art, music and physical education.
2. Shared Time instruction on the secondary level in "math topics", a remedial math course.
3. Community Education instruction on the elementary level (*i.e.*, after regular school hours, K-6 only) in voluntary, leisure-time activities.

This case does *not* involve public school instructional services which propped up financially ailing nonpublic schools

[2]

*See, e.g.*, Respondents' Brief at pp 5 (reference to secondary community education), 6 (reference to Industrial Arts), 21 (reference to secondary community education), 26 (references to the yearbook classes which were only available on the secondary (high school and junior high) level), 31 (reference to secondary community education), 35 (reference to non-public school teachers being simultaneously employed by the GRPS and area non-public schools utilizing Appendix references which apply only to secondary community education instruction), and 37 (reference to secondary community education). Similarly, overbroad inaccuracies can be found in the amicus briefs. *See, e.g.*, American Jewish Congress brief at 2 (references to Industrial Arts and secondary community education), 5 (reference to Christian High physical education instructor), 14, 21, and 41 (references to core curriculum courses).

that did not offer their own core curriculums in conformity with state law. The instructional services in question did not have the primary effect of continuing nonpublic religiously-affiliated schools that would have otherwise closed their doors. Indeed, the record affirmatively indicates that the services did not increase the enrollment in such schools. (J.A. 221).

Finally, it is important to note that the programming under review concerns instructional offerings which are *both* non-core (*i.e.*, supplementary to the core curriculum) and non-substitutionary (*i.e.*, not otherwise available in the area non-public schools). Petitioners do not contend that it would be either constitutionally permissible or even desirable for the Grand Rapids Public Schools to provide instructional offerings which do not meet these criteria<sup>[3]</sup>. Clearly, a principled basis exists, on this record, to differentiate between the programs actually at issue in this appeal and other types of instruction.

### III. Consequences of the Per Se Rule—Exaggeration Through Mischaracterization

Unlike the careful approach suggested by the Court in *Estin*, broad-brushed constitutional analysis, grounded in the fears and suspicions discussed in our introduction, lends itself quite easily to mischaracterizations of the case which grossly distort the record and impede reasoned analysis. Consequently, we find it necessary to deal briefly with such material before turning to other matters.

[3]

Respondents also hypothesize that the programs will undergo a progressive expansion. Actually, the record shows that the programs did not expand appreciably in the last four years of the six years of operation. (J.A. (131) 302-303).

#### A. The Alleged Teachers' Salary Supplement

For the first time, respondents now argue that the GRPS programs were designed "to confer substantial financial benefits upon the parochial school in the form of employing and paying from tax funds the teachers who teach secular subjects in leased classrooms of the parochial school building." Respondents' Brief at 21.

The courts below found, to the contrary, that "[t]he purpose of the Shared Time and Community Education programs are manifestly secular." (21a, 92a). In reaching its conclusion, the district court expressly relied upon the concession of respondents' trial counsel in this respect. (92a n.8).

We are at a loss to understand how paying public school shared time teachers a normal salary for the full-time teaching of public school courses constitutes a salary subsidy for non-public school teachers. GRPS paid its employees for work they performed for the school system. By contrast, in *Earley v. DiCenso*, 403 U.S. 602 (1972), the public school supplemented the salaries of teachers who were full-time nonpublic school employees.

The suggestion that the Community Education program is a teacher salary supplement is even more far-fetched. Again, salaries paid to teachers in this program were for services rendered in the program. They were not compensated for the academic services rendered during the regular school day. Without belaboring the point, it was quite obvious that the type of instruction involved was qualitatively quite distinct from the academic instruction of the regular school day. Likewise, there was no evidence even suggesting that the amount of compensation paid by the GRPS was in any way disproportionate to the services rendered to the GRPS. There is no constitutional prohibition against the employee of a religious

organization accepting separate and additional employment in the public sector. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978).

In short, the implication in respondents' brief that these programs were devious, ingenious methods designed to enhance the reputation of the religious schools or to supplement the salaries of the teachers in those schools finds no basis in the record. Indeed, such an insinuation is flatly contradicted by the findings of the district court, explicitly affirmed by the Court of Appeals, that there was no purpose or intent to advance religion unconstitutionally. (21a, 92a).

#### B. Alleged Racial Segregation

Respondents' speculation, Respondents' Brief at 44-46, that the GRPS programs could be, in either purpose or effect, a vehicle to separate students by race, is without merit. Indeed, it is inappropriate. It simply ignores the record.

Respondents belatedly attempted to interject the issue of racial segregation during the trial of this case. In response, Judge Gibson ruled that "to the extent that you are attempting to show that the Community Education program or the Shared Time program fosters racial discrimination or segregation, I am going to rule you out of order. That is not part of this lawsuit and those issues are not before this Court." Record, vol. IVA, at 726.

Moreover, the racial segregation claim is groundless. The GRPS is one of the few school systems in the nation to rebut successfully a charge of de jure pupil segregation. In *Higgins v. Board of Education of Grand Rapids*, 508 F.2d 779, 797 (6th Cir. 1974), the court of appeals affirmed a trial court finding that "the Grand Rapids district did not engage in purposeful segregation of students. . . ." Moreover, the involved



inner-city Christian and Catholic schools have significant minority pupil enrollments. (J.A. 112, 121, 137; Record, vol. IVA, at 629-630).

### C. Impact on Public Education

Clearly, respondents and their amicus supporters, like the court of appeals,<sup>[4]</sup> oppose these instructional services on leased premises in significant part because they perceive such services as a threat to the continued vitality of public education. This argument demonstrates, in stark fashion, the respondents' fundamental misconception of the role of the courts in the reconciliation of constitutional values—a misconception embodied in the *per se* solution which they urge.

Bluntly stated, as this Court has already acknowledged,<sup>[5]</sup> the judiciary has no authority to use the establishment clause for the purpose of favoring either public or nonpublic education.<sup>[6]</sup> The future of the public schools in Grand Rapids, Michigan, is the responsibility of the GRPS and the State of Michigan. Here, fully cognizant of that responsibility but also

[4]

49a.

[5]

*Mueller v. Allen*, — U.S. —, 103 S. Ct. 3062 (1983); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975).

[6]

Nor does the judiciary have the right to attempt to influence the constitutionally protected right of parents to send their children to the school of the parents' choice. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Consistent with their apparent mistrust of religious organizations, respondents and their supporting amici would have this Court apply the establishment clause in a manner designed to discourage parents from opting for private religiously-affiliated schools for their children. However, it is not the purpose of the establishment clause to encourage parents, in making their personal educational choices, to choose public schools rather than religiously-affiliated nonpublic schools. *Mueller v. Allen*, — U.S. —, 103 S. Ct. 3062 (1983).

aware of the educational needs of all its citizens, the locally elected public school board, consistent with state law, expanded the provision of supplemental public school instructional services to educationally needy and gifted children under conditions of public school control. This expansion of public education opportunities, by public school authorities, did not result in any decline in public school enrollment or support. Indeed, these programs resulted in the GRPS receiving an additional three million dollars in state funds with which to increase the educational opportunities available for full-time public school students. (7a n.6). As a factual matter, the instructional services at issue did not bolster religiously-affiliated nonpublic schools at the expense of public schools. (J.A. 221).

### IV. Consequences of the "Per Se Rule"—Ignoring the Record

Reliance on broad brush *per se* rules not only induces a good deal of mischaracterization, it also results in a distinct lack of precision in factual analysis. We turn now to correct the misimpressions left by respondents' inattention to the record.

#### A. Student Body Identity

Although this Court has already stated that student body identity is not, taken alone, a constitutionally determinative factor in establishment clause analysis, *Wolman v. Walter*, 433 U.S. 229, 246-247 (1977), respondents suggest that this factor also ought to be applied as a *per se* rule of invalidity.

Here, the identity of the student body, at least with respect to the Shared Time program,<sup>[7]</sup> resulted from the decision

[7]

In the elementary community education context, some crossovers occurred where children would attend community education classes at buildings other than the buildings which they otherwise attended during the regular school day. (J.A. (1218) 350).



of the GRPS to provide the course offerings to *all* children of the district at their school of primary attendance. The establishment clause implications of such a decision, as the Court noted in *Wheeler v. Barrera*, 417 U.S. 402, 426 (1974), require a careful evaluation of the facts. As we noted in our principal brief, here in Grand Rapids, that decision was based on the practical considerations of, first, lack of space in GRPS owned school buildings, second, prohibitive transportation costs, and third, the desire to eliminate unnecessary pupil transportation which would detract from the overall educational effectiveness. Petitioners' Brief at 11. Certainly, such a common-sense arrangement, cannot, by itself, be considered violative of the establishment clause. Here the record affirmatively shows that the identity of the student body caused no other impermissible effects. Curriculum, teaching methods, and class discipline were all under the control of GRPS. Petitioners' Brief at 16. The students were taught in precisely the same manner as full-time public school students in GRPS owned buildings.

#### B. Excessive Entanglement

The record affirmatively demonstrates that the contacts between the GRPS personnel and personnel of the nonpublic schools were minimal and involved no extensive and protracted dealings. There was no controversy over the conduct of the Shared Time courses or their administration.

Faced with this record, respondents—like the court of appeals—must rely on a *per se* rule based solely on location. Although extensive discovery and an eight-day trial produced no evidence of impermissible entanglement, respondents persist in maintaining that simply because of the location of the classes, reality must be different than the facts in the record. We submit that, while respondents and other individuals are

free to form their conclusions on the basis of such stereotypes, courts ought to decide cases on the basis of the record.

Respondents attempt to justify a *per se* geographic rule with respect to entanglement by suggesting a series of "what ifs." These suggestions take significant liberties with the record and we now turn to correcting the most important errors.

#### 1. The Professionalism of the GRPS Teaching Staff

Although, through discovery and an eight-day trial, they were unable to find a single instance of a GRPS Shared Time or Community Education teacher fostering religion or engaging in impermissible contacts with the nonpublic school personnel, respondents continually suggest that such instances must have regularly occurred. *E.g.*, Respondents' Brief at 29, 30. However, as this Court noted in *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 660-61 (1980), a court ought not read into a plan "as an inevitability the bad faith upon which any future excessive entanglement would be predicated." Moreover, it is not difficult to perceive a certain time-lag in respondents' "what if." Twelve years after *Lemon*, the professional public educator—and, for that matter, the professional nonpublic educator—have made, on the basis of this Court's frequent pronouncements, the necessary adjustments in their professional relationships. The teachers involved in these programs knew their jobs—and part of their jobs was knowing how to deal with public-religious encounters. We have set out in some detail in our principal brief, Petitioners' Brief at 38, how the GRPS instructed its teachers in this regard. These teachers were subject to the same classroom observation and evaluation process on leased premises that was utilized for all other full-time public school teachers

in the GRPS owned buildings.<sup>[8]</sup> (J.A. (¶156) 330). This evaluation process was designed to ascertain secular teaching competence. A by-product was to verify that GRPS teachers, consistent with the Shared Time Guidelines (J.A. 214), were not advancing religion.

## 2. Administrative Relationships

The respondents similarly suggest countless *possibilities* for entanglements at the administrative level. The record is to the contrary, however. As noted in our principal brief, Petitioners' Brief at 40, the record revealed that the contacts between GRPS officials and the nonpublic school administrators merely involved (1) distributing information about the program; (2) processing requests for the receipt of such services; and (3) scheduling the courses and related matters. Shared Time teachers were transient and had little time for contact with nonpublic administrators. (J.A. (¶13) 70). Materials and supplies were purchased by the GRPS and were not used by the nonpublic schools. (J.A. (¶¶188-192) 341-342). Respondents wholly failed to produce any record evidence of controversy or friction between public and nonpublic school authorities in the implementation and operation of the challenged programs.

## 3. Role of Nonpublic School in Teacher Assignments

Respondents argue that the nonpublic school authorities "maintained considerable control" over the assignment of Shared Time teachers because, in their words, "so many" of them were sent "back to school buildings where they had

[8]

As Justice Blackmun noted in *Wolman v. Walter*, "[i]t can hardly be said that the supervision of *public* employees performing *public* functions on *public* property creates an excessive entanglement between church and state." 433 U.S. at 248 (emphasis supplied).

taught as employees of" the area nonpublic schools. Respondents' Brief at 35-36. Simply put, the record does not support their contention.

Of the 131 Shared Time teachers providing shared time instruction during the 1981-1982 school year, only 13, or approximately 10%, previously taught in area nonpublic schools. (J.A. 193)<sup>[9]</sup>. In a school district with such a high number of religiously-oriented schools (both absolutely and as a percentage of the total number of schools), this is hardly excessive. It is plainly unrealistic to expect the GRPS to fulfill all its staffing requirements without utilizing the services of some teachers who, at some time in their career, taught in some religiously-oriented school. More importantly, the uncontroverted record established that, in each instance, nonpublic schools did not exercise any input into or control over the shared time teacher assignment process. (J.A. (¶202) 344).<sup>[10]</sup> The understanding of the area nonpublic school administrators on this point is typified by the trial testimony of principal John Jaksa (principal of St. Stephens) when he stated:

Q. The teachers, public school teachers that have been assigned to perform their services at St. Stephens' location are supervised and evaluated by Grand Rapids Public

[9]

Because secondary Shared Time (with the exception of "math topics") is no longer at issue in this case, the number "13" should be reduced to account for those secondary teachers employed by the GRPS who were formerly employed by area nonpublic schools. When so evaluated, the percentage of GRPS Shared Time teachers previously employed by area non-public schools is significantly reduced from the 10% figure established at trial.

[10]

Neither of the lower court opinions made any finding to the effect that nonpublic school administrators either attempted to control or in fact controlled the teacher assignment process in the operation of the Shared Time program. (75a-76a).



School employees and not you or anyone else on the St. Stephens' staff, am I correct?

A. Correct.

Q. Neither you nor anybody else that you know of that's on the staff or board or whatever of [St. Stephens] ... to your knowledge, had any input as to which teacher would or would not be assigned to the St. Stephen's facility for shared time purposes?

A. We have no input.

Q. You have not had any input?

A. Correct, no, sir.

Record, vol. IVA, at 733. Or, as observed by principal Ronald Boss (principal of Oakdale Christian School):

Q. Mr. Boss, with reference to the reading teachers whose names you just recited, am I correct that you had nothing to do with the decision as to them being assigned to your building?

A. That's correct.

Q. And, you understand and have acted with the understanding that any Grand Rapids public school personnel assigned to the Oakdale Christian building are Grand Rapids employees and not—

A. Yes, they are.

Q. And not the association's employees?

A. No, sir.

Q. And, you have understood and acted with the understanding as far as supervision or evaluation of those

personnel that that's up to the Grand Rapids Public School and not to you or anybody else associated with the Oakdale Christian School?

A. And they do.

Record, vol. IVA, at 651-652.

#### 4. Political Divisiveness Along Religious Lines

Relying on the stereotypes born of their *per se* rule, respondents and their amici continue to argue that, despite their failure to establish the proposition at trial, this program presents an impermissible potential for political divisiveness. Since they have not been able to establish that the GRPS programs have that infirmity, they must, in effect, urge the stereotypical notion that any program of this sort presents such impermissible potential for entanglement.

First, we submit that an inquiry into whether the program has the potential for political divisiveness is not relevant in this case. The GRPS program is not "a direct subsidy to church-sponsored schools and colleges or other religious institutions," *Lynch v. Donnelly*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1355, 1364-65, (1984); *Mueller v. Allen*, \_\_\_ U.S. \_\_\_, 103 S. Ct. at 3062, 3071 (1983). In purpose and effect, it provides educational services for *all* the *children* of Grand Rapids.

Nevertheless, even if such an inquiry were appropriate, the argument is without merit. At trial, respondents did not produce any evidence to suggest that either the Shared Time or Community Education programs fostered political divisiveness along religious lines. Indeed, the only testimony pre-



sented at trial proved the exact opposite.<sup>[11]</sup> (J.A. 155, 205). As noted by board president Pojeski:

Q. Can you tell the court whether or not the providing of these courses on the nonpublic site has been a divisive issue or a dividing issue as far as the community is concerned?

A. If anything, I would have to say the reverse was true. . . .

Q. Since you have been on the Board of Education . . . is it the same thing there or is it different, has it been divisive or has it not been that?

A. Well, in my own personal . . . experience, it has never been a campaign issue at any time.

Record, vol. VA, at 905-906. Or, as stated by previous board president Alland:

The Shared Time courses and instruction offered by the Grand Rapids Public Schools have not been a politically divisive issue between the members of the Board of Education, nor has it been an issue in any school board election campaign, or in a school millage election campaign. I do not believe the Shared Time program has been a

[11]

The court of appeals' and district court's characterization of the discussion of the programs during the March 1980 millage election is without support in the record. (27a, 44a). Political *discussion* of the programs does not mean that there was religiously-based divisiveness. Indeed, it was quite proper for the GRPS to emphasize that these programs benefited the entire community. Parents with children in public schools needed to know that these programs resulted in more state funds for public schools. Parents of children in non-public schools needed to know that these children would also benefit from certain public school programs. Petitioners' Brief at 43.

divisive issue in the community. In fact, it is my belief that the program has been very successful and that it has been well received by the entire community.

(J.A. 205). The same situation obtains on the state level as evidenced by the trial testimony of Robert Hornberger of the Michigan Department of Education.

I have not observed any political controversy in terms of attempts to change the statutes and administrative rules that provide school districts with a discretionary authority to provide Shared Time instruction on premises leased from nonpublic schools and receive state school aid payments for part-time public school students who are also enrolled in nonpublic schools.

(J.A. 155). Such testimony should hardly be surprising. *Wolman v. Walter*, 433 U.S. at 263, Justice Powell made special note of the growing capacity of Americans to deal maturely with civil-religious relationships. "The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote. . . ."

Nor does respondents' eleventh hour reliance on the post-appeal resolution of the State Board of Education, Respondents' Brief at 48-49, have any relevance in this regard. As we noted in our brief, Petitioners' Brief at 4 n.6, the resolution of the board is simply a somewhat premature expression by a lay board of its opinion regarding the legal merits of this case—an opinion not shared by the Attorney General of Michigan who has the constitutional and statutory authority to determine the legal position of the state. Nor does it indicate that, once the constitutional issue is resolved by this Court, the program

will engender any religiously-based political divisiveness within the community.<sup>[12]</sup>

In short, respondents ask this Court to undertake a task which Justice O'Connor has termed "simply too speculative an enterprise." *Lynch v. Donnelly*, — U.S. —, 104 S. Ct. 1355, 1367 (1984). The political divisiveness inquiry always

[12]

Likewise, respondents' half-hearted suggestion of mootness, made in passing at the same point, is not well founded. The board did not purport to compel Michigan school districts to terminate Shared Time programs. Indeed, during the board's existence under Mich. Const. art. 8, §3, it has never purported to exercise any authority to compel school districts to terminate programs authorized by the Michigan legislature. The Michigan Constitution is a limitation on the otherwise plenary powers of the Michigan legislature. *Huron-Clinton Metropolitan Authority v. Boards of Supervisors*, 300 Mich. 1, 12, 1 N.W. 2d 430, 433 (1942). The Michigan Supreme Court has never held that, pursuant to Mich. Const. art. 8, §3, the State Board of Education may compel school districts to terminate programs that have been authorized and funded by the Michigan legislature. To the contrary, the Michigan Supreme Court recently reiterated the long standing rule that "[s]chool districts possess such power as statutes expressly or by reasonably necessary implication grant to them." *Jurva v. Attorney General*, 419 Mich. 209, 214 (1984). See also *Senghas v. L'Anse Creuse Public Schools*, 368 Mich. 557, 118 N.W.2d 975 (1962). In *Traverse City School District v. Attorney General*, 384 Mich. 390, 411 n.3, 185 N.W.2d 9, 17-18 n.3 (1971), the Michigan Supreme Court noted that the authority for school districts to establish Shared Time programs is derived from "statutory language." The Court went on to hold that, in 1955 Mich. Pub. Acts, No. 269, §583, the predecessor to 1976 Mich. Pub. Acts, No. 451, §1282, Mich. Comp. Laws §380.1282 (1979), the legislature had authorized the establishment of Shared Time classes on premises leased from nonpublic schools. Similarly, the exclusive authority of the Michigan legislature to appropriate state funds for the state treasury is beyond dispute. See Mich. Const. art. 9, §17, *Board of Education of Detroit v. Superintendent of Public Instruction*, 319 Mich. 436, 453, 29 N.W.2d 902, 910 (1947), *Regents of the University of Michigan v. Labor Mediation Board*, 18 Mich. App. 485, 490, 171 N.W.2d 477, 479 (1969).

brings the risk of stifling discussion and creative resolution of important community issues. When, as here, a community has demonstrated—on the record—that its officials have developed and implemented for six years a program acceptable—and beneficial—to the *entire* community, such judicial speculation is, we submit, especially intrusive and destructive.

## CONCLUSION

In *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), Justice Brandeis wrote:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of a federal system that a single courageous State may, if its citizens choose, serve as a laboratory. . .

Respondents, by urging that this Court adopt a *per se* rule, ask that it cut off such experimentation. The "interaction between courts and states" described by this Court in *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980), would be stifled or, more precisely, choked off entirely.

Petitioners submit that such interaction is essential to a just reconciliation of the values protected by the Religion Clauses and the responsibilities of the states to provide education for all the people. We further submit that the Grand Rapids program is an "experiment" that has worked. Its success has been established on the record. The local school board, representing a community where religious beliefs are diverse and important, carefully developed a program to provide the community's young with supplementary educational assistance. It molded the programs which avoided advancing religion and the possibility of excessive administrative entanglement with-

out creating the potential for political divisiveness. It implemented the programs for six years without a problem. When called upon to justify it in federal court, it produced a record which demonstrated both its good faith and its constitutional results. It now asks simply that its efforts not be judged by stereotypes or by the respondents' "what ifs." Its people have the right to enjoy the fruits of their careful planning.

For the foregoing reasons, the petitioners respectfully request a reversal of the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted

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